Petition

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Supreme Court, U.S.
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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

FORTY-EIGHT INSULATIONS, INC. and TRAVELERS INDEMNITY OF RHODE ISLAND,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a diversity case involving the application of liability insurance contracts to product liability claims against manufacturers of asbestos-containing products, is it constitutional for the federal court to "reverse the ordinary burden of proof" established under state decisional law, in order to "maximize" the insurance coverage which will be available to the insured before the court?

2. When the burden of proof with respect to facts necessary to establish insurance coverage is allocated in accordance with the applicable state law, can the "exposure theory" of coverage adopted by the court below for asbestos cases be upheld in preference to the "manifestation theory" of coverage which is generally applicable to disease cases?

3. Does the novel approach to insurance coverage created below to deal with the thousands of asbestos product lia-

bility actions which pend in the nation's courts, so imperil the administration of justice in the lower federal courts as to require review pursuant to this Court's supervisory powers?

LIST OF PARTIES

Petitioner Liberty Mutual Insurance Company was a defendant in the district court and appellant in the court of appeals. Respondents Forty-Eight Insulations, Inc. and Travelers Indemnity of Rhode Island were also defendants in the district court, but were appellees in the court of appeals. (Forty-Eight Insulations, Inc. was also a cross-appellant below.) Three other parties, not named in the caption above, advocated the same position as Petitioner in the court of appeals. They were Insurance Company of North America (plaintiff in the district court and appellant in the court below), and Affiliated FM Insurance Company and Illinois National Insurance Company (both defendants in the district court and appellants below.) Pursuant to F. R. App. P. 28, the parties were realigned for briefing and argument according to the positions they advanced in the court of appeals.

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OPINIONS BELOW

Petitioner Liberty Mutual Insurance Company respectfully prays that this Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit which was entered on October 21, 1980 (Appendix A below), and is reported at 633 F.2d 1212. Pursuant to timely petitions for rehearing and suggestions for rehearing *en banc* filed by Petitioner and two other parties, the Sixth Circuit modified its opinion (Appendix B) on March 5, 1981, and otherwise denied the petitions for rehearing. The order modifying the court's original opinion and denying rehearing is not officially published.

The opinion of the United States District Court for the Eastern District of Michigan in this case (Appendix C) was entered on May 4, 1978, and is reported at 451 F. Supp. 1230.

JURISDICTION

The opinion of the Sixth Circuit, Judge Merritt dissenting, was entered on October 21, 1980. Pursuant to timely petitions for rehearing, the Sixth Circuit modified its opinion on March 5, 1981, and otherwise denied the petitions for rehearing. Justice Stewart on May 22, 1981 granted an extension of time until August 2, 1981 to file this petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). It accordingly involves the Tenth Amendment to the United States Constitution, the Diversity Clause of Article III of the United States Con-

stitution, and the Rules of Decision Act, 28 U.S.C. § 1652. These are reproduced in pertinent part in Appendix D below.

STATEMENT OF THE CASE

This is a declaratory judgment action requiring an interpretation as to how standard comprehensive general liability insurance policies, used throughout the United States since at least 1966, apply to thousands of asbestos-related product liability cases which pend in state and federal courts throughout the country. The plaintiff was Insurance Company of North America ("INA"), and the insured which it sued is named Forty-Eight Insulations, Inc. ("Forty-Eight"). INA also named as defendants all of the other insurers which could be identified as having issued primary general liability insurance to Forty-Eight during previous years. These companies were Petitioner Liberty Mutual Insurance Company ("Liberty"), Affiliated FM Insurance Company ("Affiliated FM"), Illinois National Insurance Company ("Illinois National"), and Travelers Indemnity of Rhode Island ("Travelers"). Jurisdiction of the district court was invoked pursuant to diversity of citizenship, 28 U.S.C. § 1332.

The primary liability insurance which Forty-Eight had since 1955 [1] is set out in detail in the Appendices to the Sixth Circuit's opinion, 633 F.2d at 1227 *et seq.*, and can be summarized as follows:

INA	October 31, 1955-October 31, 1972
Affiliated FM	October 31, 1972-January 10, 1975
Illinois National	January 10, 1975-January 12, 1976
Travelers	January 12, 1976-November 8, 1976
Liberty	November 8, 1976-January 1, 1978

[1] "Forty-Eight thought that it did have insurance coverage before 1955. However, any such policies were lost and/or destroyed and Forty-Eight was unable to prove it had any coverage before that date." 633 F.2d at 1215.

The product liability cases against Forty-Eight typically are brought by construction and insulation workers, who allege that they contracted one or more lung diseases after inhaling asbestos fibers contained in insulation products manufactured by Forty-Eight and numerous other manufacturers. The diseases in question are asbestosis, a fibrotic disease in which non-malignant scar tissue forms in the lung, and two forms of cancer, bronchogenic carcinoma (lung cancer) and mesothelioma, a tumor of the pleura (the lining of the chest cavity). "Usually, the worker has been exposed to asbestos particles for many years—at least 10, and generally for 20 or more," before becoming ill. 633 F.2d at 1215. The question is thus which policy during that period provides for defending the manufacturers against such claims, and paying claims that result in settlements or verdicts.

The insurance policies in issue are uniform comprehensive general liability policies in common use throughout the United States. They apply to any loss due to an **Occurrence,**[2] which is defined as "an accident, including continuous or repeated exposure to conditions, which results in **Bodily Injury** or **Property Damage** neither expected nor intended from the standpoint of the **Insured.**" The product liability actions against Forty-Eight, of course, involve the **Bodily Injury** coverage. This is defined in these terms:

> "**Bodily Injury**" means bodily injury, sickness or disease sustained by any person *which occurs during the policy period*, including death at any time resulting therefrom. [Emphasis added.]

With respect to a worker who has asbestosis or cancer as a result of using products manufactured by Forty-Eight over the last several decades, therefore, the question is during

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[2] Words in boldface type appear thus in the policies, and denote words specifically defined therein.

which policy period his "bodily injury, sickness or disease . . . occurs."

Liberty and several other parties advanced what is colloquially termed the "manifestation theory" of coverage. This holds that asbestosis and cancer are *diseases*, and that they "occur" when they manifest themselves through the appearance of signs or symptoms discernable to the claimant or his physician.[3] Respondents advocated the "exposure theory," under which each exposure to asbestos triggers coverage under the policy in force at that time, no matter

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[3] That a disease "occurs" for insurance purposes when it becomes manifest is well-established in such decisions as *Grain Handling Company, Inc. v. Sweeney*, 102 F.2d 464, 466 (2d Cir. 1939) (L. Hand, J) *cert. denied*, 308 U.S. 570 (1939): ". . . [A] disease is no disease until it manifests itself." The same principle underlies this Court's holding in *Urie v. Thompson*, 337 U.S. 163, 170 (1949) ("Nor can we accept the theory that each intake of dusty breath is a fresh 'cause of action.'"). *Urie* applied to silicosis, a disease for our purposes identical to asbestosis. *Cf. Clutter v. Johns-Manville Sales Corp.*, ... F.2d ... (6th Cir. 1981) (No. 79-3004, April 7, 1981, Slip Opinion at 13), an opinion in which the Sixth Circuit repudiated what it said only a month earlier in the instant case: "In the present cases, the injurious exposure did not cause contemporaneous injury, but rather set forces in motion which later manifested themselves in asbestosis, according to plaintiffs' claims."

As Judge Merritt wrote in his dissent below, 633 F.2d at 1229:

> The exposure theory, although appealing on first reading, is at odds with insurance and tort law and fairness.
>
> * * *
>
> . . . In both lines of cases [health insurance cases and property damage cases] latent conditions that are not discoverable with a reasonable certainty do not amount to an event or condition that triggers indemnification liability.

The Sixth Circuit acknowledged that it was creating "special rules" for diseases related to asbestos, 633 F.2d at 1219, and was refusing to follow the precedents and "solid arguments" which support the manifestation principle. *Id.* It felt compelled to do so, however, in order to "maximize" the coverage which would be available to the insured in light of the avalanche of asbestos-related cases against it.

when the disease results. Under this theory, if a claimant worked with asbestos products for twenty years before getting cancer, each insurer bears one-twentieth of the loss and cost of defense for each year it was "on the risk." Similarly, the insured bears the same proportional responsibility as to exposures that took place when it had no insurance.

The Sixth Circuit, Judge Merritt dissenting, adopted the exposure approach, but only as to asbestosis, because of the "cumulative" and "progressive" nature of the disease. Pursuant to petitions for rehearing, the court modified its opinion on March 5, 1981 (Appendix C), to treat all three of the lung diseases associated with asbestos in the same way, primarily for administrative practicality.[4]

Everyone recognizes that a claimant does not contract cancer or asbestosis the first day he is exposed to asbestos. The rationale of the Sixth Circuit, however, was that there is some "tissue damage" within the lungs each time a person inhales asbestos fibers, even though in most persons it never becomes clinically significant. This, the court held, is "bodily injury" which occurs during all of the policies in force during the exposure period, even though it obviously is not (and indeed, might never become) "sickness or disease."

REASONS THE WRIT SHOULD BE ALLOWED

Although the ruling of the district court, which the Sixth Circuit affirmed, was "challenged by virtually every party and *amicus* on one ground or another," 633 F.2d at 1226, all would agree on one thing. This case does present "a novel and important question of insurance law" which

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[4] The court's original opinion differentiated between asbestosis and the two cancerous diseases, lung cancer and mesothelioma, on the grounds that the latter diseases "present very different considerations." 633 F.2d at 1214, n.1.

is "one of first impression for an appellate court. . . ." *Id.* at 1213, 1223. In addition to the six parties, nine *amici curiae* filed briefs below. They represented primary insurance carriers, excess carriers, and insureds. Both theories of interpretation were supported by companies at every level. Further attesting to the interest which the issue has created are at least twenty-one other pending suits in federal and state courts which raise the same coverage question as this one. They are listed in Appendix E below.[5]

Notwithstanding the colossal importance of the issue and the widespread attention it has received,[6] it would remain a matter of contract interpretation as to which this

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[5] On April 8, 1981, the Fifth Circuit followed the Sixth Circuit's opinion in this case without independent evaluation. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981). The United States District Court for the District of Columbia did the same thing in *Keene Corp. v. Insurance Co. of North America, et al.*, No. 78-1011 (D. D.C., filed June 6, 1978), in a memorandum opinion dated January 30, 1981. The *Keene* ruling is before the United States Court of Appeals for the District of Columbia Circuit, No. 81-1180 and Consolidated Cases, pursuant to interlocutory appears under 28 U.S.C. § 1292(b). The case was expedited for briefing and argument, and argument was held on June 16, 1981.

[6] One can hardly overstate the importance of the coverage dispute in terms of its effect upon judicial administration throughout the United States. In the wake of *Borel v. Fibreboard Paper Products Corporation*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), has come "an avalanche of lawsuits against the entire asbestos manufacturing industry." 633 F.2d at 1215. Liberty is presently defending more than thirty thousand such claims, brought by more than ten thousand individual plaintiffs, and the number continues to grow almost geometrically. Some courts, particularly those in the Eastern District of Texas, have written that they are in danger of being brought almost to a standstill by the burden these suits have created. "The number of asbestos-related cases in this district alone is quite dramatic. At the most recent count, 2,445 plaintiffs had claims against all or some of the same manufacturers named in this suit." *Migues v. Nicolet Industries, Inc.*, 493 F.Supp. 61, 64 (E.D. Tex. 1980). The resolution of the coverage issue, because it will determine who will be trying, settling, and appealing these cases, is integrally tied up with these problems.

Court's exercise of its certiorari power would not be appropriate, but for one fact. The court below, in struggling to create a new rule to deal with the "novel and important" question before it, stated that it would "simply reverse the ordinary burden of proof" established under the applicable state law for insurance coverage disputes. 633 F.2d at 1225-26, n.27. In doing so it "decided a federal question in a way in conflict with applicable decisions of this Court," Rules of the Supreme Court, Rule 17.1(c), by disregarding the numerous decisions after *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which have held that state rules as to burden of proof are a matter of substance which the federal courts must apply, as they find them, in diversity cases.

The issue relates to more than asbestos, moreover. The same arguments which underlie the exposure approach in the asbestos context are now being made with respect to such diverse pharmaceuticals as oral contraceptives, DES, and other drugs, and with respect to the Agent Orange multi-district litigation pending in the Eastern District of New York. *See, e.g., American Home Products Corporation v. Liberty Mutual Insurance Company*, No. 80 Civ. 5653 (S.D.N.Y., filed October 6, 1980); *Travelers Indemnity Company v. Monsanto Company, et al.*, Civil No. 81-3485 (S.D.N.Y. filed June 5, 1981). If the Sixth Circuit's ruling is upheld, we can expect a lifetime of litigation to determine which cases come within the asbestos rule, and which come within the traditional manifestation approach. *Cf.* "Suits That Are Searing Asbestos," Business Week, April 13, 1981, pages 166, 169:

> . . . Since illnesses caused by asbestos, such as cancers of the lung, chest, and abdomen, are "latent," typically appearing 10-20 years after exposure, the potential damages could be staggering.
>
> Even more troublesome, some experts believe that asbestos litigation represents just the initial onslaught of an occupational—and environmental—related disease lawsuits that will deluge the courts in coming years. . . . New legal remedies in the absestos area will almost certainly be applied in cases involving hazardous waste dumping, DES, Agent Orange, and a host of other toxic substances.

A. The Sixth Circuit's Ruling Respecting the Burden of Proof

The foundation of the Sixth Circuit's ruling that each "exposure" to asbestos-containing products triggers insurance coverage, is its finding that sub-clinical "tissue damage" takes place shortly after each inhalation of asbestos fibers, even though medically detectible disease does not result, if ever, until many years later. 633 F.2d at 1222. From this it follows that each insurer (or the insured if it had no coverage at the time) is responsible for exposures ("injuries") which took place during its policies.[7]

One problem with this reasoning, however, is that it puts the insured in an impossible situation. As Liberty pointed out in the court below, a given insurer's policy can be triggered only by "bodily injury, sickness or disease" which occurs, during its policy, as a result of *its insured's* product. Injury caused by someone else is irrelevant. In order for the insured to resort to the limits under its 1960 policy, for example, it has to show that an exposure to *its* product took place in that year, if exposure is the test of coverage.

The Sixth Circuit admitted that only exposures to the insured's products counted in determining coverage (after holding that exposure is what triggers coverage to begin with), at 633 F.2d 1225:

> Accordingly, where an insurer can show that no exposure to asbestos manufactured by its insured took place during certain years, then that insurer cannot be liable for those years. The reason is simple: no bodily injury *resulting from Forty-Eight's products*

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[7] We note only in passing here that the courts have traditionally differentiated between "disease" and "injury" in insurance cases, and have not allowed diseases to be treated as though they were a twenty or thirty year stream of injuries. "The words 'bodily injury' are commonly and ordinarily used to designate an injury caused by external violence, and they are not used to indicate disease." *Burns v. Employers' Liability Assurance Corporation*, 134 Ohio St. 222, 233, 16 N.E.2d 316, 321 (1938).

> took place during the years in question. [Emphasis in original.]

It is textbook law, however, that in a coverage dispute it is the insured which has the burden of proving all of the facts necessary to establish that the policy applies to the loss in question. Because we are dealing here with exposures which took place at least twenty and as many as forty years ago, it obviously would be a practical impossibility for the insured to produce evidence that its particular cement was used in any individual year.*

Liberty argued below, therefore, that if the court held that each exposure to asbestos was the insured event, it would rob most insureds of any meaningful coverage. They would be trapped with the burden of proving that exposure to their products took place each and every year when there was a policy in place to which they wished to resort.

The Sixth Circuit acknowledged that this was a problem. It dealt with it, however, by simply "reversing" the burden of proof provided under state law. At this point the court passed from dubious contract interpretation to an error of constitutional importance.

> *We recognize that the general rule is that the burden of proof to show coverage is on the insured.* See, e.g., *Hays v. Country Mutual Ins. Co.*, 28 Ill.2d 601, 192 N.E.2d 855, 858 (1963); *Warren v. Employers' Fire*

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* The claimant in the underlying action does not have to prove any such thing, of course. Under the leading case, *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), all the claimant has to show is that he used a given asbestos product at some time—it does not matter when or how often—and that it contributed to his disease. At that point the manufacturer is jointly and severally liable together with all of the other manufacturers whose products were used over the worker's lifetime. Which product was used when is an evidentiary nightmare which no one has had to face until the Sixth Circuit's ruling here made the timing of each exposure a critical fact in determining insurance coverage.

> *Ins. Co.*, 100 N.J. Super. 464, 242 A.2d 635, 639 (1968), *rev'd on other grounds*, 53 N.J. 308, 250 A.2d 578 (1969); 46 C.J.S., Insurance § 1316; 44 Am. Jur. 2d Insurance § 1964.[9]
>
> In an asbestosis case, however, under *Borel*, all that an injured worker need do is prove that a given manufacturer's products contributed to the worker's asbestosis at any time. That is enough to trigger joint and several liability. As the briefs filed in this case forcefully remind us, few companies keep records more than 15 or 20 years, if that long. Thus, in many if not most cases, it will be impossible to tell which company's products were used at what time. At best, there will be vague testimony that manufacturer X's products were used at a certain job site during certain years. Considering that much exposure took place during the 1930's and 1940's, vague testimony is the best evidence that can be unearthed in many cases.
>
> Because of these unique circumstances, we think it appropriate to presumptively view each manufacturer as being on the risk for each of the years in which a worker was exposed to asbestosis. If an insurance company can show that a certain manufacturer's products were not or could not have been involved for certain years, it will be absolved from paying its pro-rata share for those years. Given the impossibility in most cases of ascertaining which company provided asbestos products in different years, we think that this is the fairest way to apportion liability. *Thus, we simply reverse the ordinary burden of proof and place it on the insurer.* We are keenly aware of the need to apply a straightforward formula and not one which will lead to additional litigation.

633 F.2d at 1225-26, n.27; emphasis added.

Liberty believes that whatever the merits of the manifestation versus exposure debate may be, and we will not

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[9] As noted below, the insurance policies here were entered into in New Jersey (as to Liberty) and Illinois (as to the other insurers), and the law of those two states thus controlled.

argue them at length here, it is abundantly clear that the court below was not constitutionally entitled to "reverse" a well-established rule of state law on this point.[10]

B. By Consciously Ignoring Established State Law Regarding The Burden Of Proof In Insurance Cases, The Court Of Appeals Has Violated The Prohibitions Enunciated In Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) And Wrongfully Created Federal Common Law.

After acknowledging that both Illinois and New Jersey follow the "general rule" that the burden of proving coverage under an insurance policy is upon the insured, and correctly noting earlier in its opinion (633 F.2d at 1219) that it "must apply Illinois and New Jersey law," the court below cast aside these principles and shifted to the insurer the burden of proving a lack of insurance coverage. Footnote 27 of the court's opinion states that once an asbestos claimant has established that he used a particular manufacturer's products at *some* time during his working life, the court would presume that the manufacturer's products had been used each and every year there was a policy in force. Thus, each of the manufacturer's insurers would be required to pay a pro rata share of the manufacturer's liability to the claimant, unless the *insurer* can establish by a preponderance of the evidence that the claimant was not exposed to that manufacturer's asbestos products while the insurer was on the risk.

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[10] The *Erie* question presented by the Sixth Circuit's reversing the burden of proof has never been argued or briefed in this case. Liberty mentioned the burden of proof in its brief below only to show that the effect of the exposure theory would be to give manufacturers only illusory coverage. The Sixth Circuit raised the idea of "reversing" the burden of proof created under state law *sua sponte*. The only mention of the point is that contained in the court's footnote 27 quoted in full above. The Sixth Circuit cited no authority for its "reversing" a well-established state rule concerning the allocation of burden of proof in a contract dispute, and did not advert to the *Erie* question presented by its doing so.

As the Sixth Circuit said in footnote 27, the antiquity of the events and the lack of records surely means that ". . . in many if not most cases, it will be impossible to tell which company's products were used at what time." It is thus impossible to overemphasize the impact which this reversal of the burden of proof will have upon the parties in this case and other parties in future cases. If exposure to an insured's product is what triggers an insurance policy in any given year, whoever has the burden of proving that exposure will almost certainly lose.

This Court has long recognized that a court's allocation of the burden of proof directly affects the substantive rights of the parties, and is not merely a matter of procedure. *See, e.g., Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-249 (1942); *Central Vermont Ry. v. White*, 238 U.S. 507, 511-512 (1915).[11] As was noted in *Speiser v. Randall*, 357 U.S. 513, 525 (1958):

> In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome.

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[11] The New Jersey courts have stated the rule regarding burden of proof in even stronger terms. In reviewing a case wherein the trial court's instructions shifted the burden of proof to the defendant to establish that it was not negligent, the New Jersey Court of Errors and Appeals made the following statement:

> . . . "[T]he burden of proof" has a fixed and definite meaning. It is not a question of words or of mere form of expression but of a very substantial and fundamental right; . . . The very meagerness of the proof and the fact that presumptions had to be met and inferences to be drawn, made the question of the burden of proof all the more important, since it may well be that the state of proof was such that whoever had to bear the burden of proof must fail because of such burden. *In such a case the burden must remain where the law places it or the resulting judgment must be reversed.*

Niebel v. Winslow, 88 N.J.L. 191, 193-194, 95 A. 995, 996-997 (1915); emphasis added. *See also, Alcaro v. Jean Jordeau, Inc.*, 138 F.2d 767, 770 (3rd Cir. 1943); *Wilson v. Public Service Co-*

Because of its substantive effect upon the rights of the parties, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court whose subject matter jurisdiction is based upon diversity of citizenship is bound to follow applicable state law regarding burden of proof. *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446 (1959) ("Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive'. . . ."); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (even though F. R. Civ. P. 8(c) makes it the defendant's obligation to plead contributory negligence as an affirmative defense, that does not affect the burden of proving it. "The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases [citing *Erie*] must apply."); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939) (Burden of proof in matters affecting real estate "relates to a substantial right" and is governed by state law).

That the court of appeals failed to follow this settled rule of law is apparent from a review of applicable New Jersey and Illinois law regarding burden of proof in insurance cases. Regardless of the type of insurance policy involved, both states require the insured to carry the burden of proving facts which establish coverage under the policy, not the insurer. If the insured fails to carry this burden, judgment must be entered for the insurer.

For example, in *Shopp v. Prudential Ins. Co. of America*, 115 N.J.L. 162, 178 A. 724 (1935) the plaintiff sued to

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ordinated Transport, 126 N.J.L. 250, 255, 20 A.2d 368, 372 (1941); *Bien v. Unger*, 64 N.J.L. 596, 597, 46 A. 594 (1900).

The importance of this issue is also underscored by three of this Court's recent decisions dealing exclusively with the burden of proof in employment discrimination cases. *Texas Department of Community Affairs v. Burdine*, ... U.S. ..., 49 U.S.L.W. 4214 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978).

recover under a double indemnity clause in an insurance policy on the life of her son. The evidence showed that the deceased was sitting at the edge of a swimming pool when last seen alive by a friend, but that five minutes later he was found dead at the bottom of the pool. In holding that a verdict should have been directed for the insurer, the court set forth the following rule:

> The burden rested upon the plaintiff to show by adequate proofs that death resulted from accidental causes as defined in the terms of the policy, and a careful examination of the proofs leads us to the conclusion that this burden has not been met. . . . It being essential that death by external, violent, and accidental means to which disease did not contribute be established, we think the proofs were insufficient for the purpose, and the defendant was entitled to have its motion for direction granted.

115 N.J.L. at 165; 178 A. at 725-726.

This principle was applied in a different context in *Brindley v. Firemen's Insurance Co. of Newark, N.J.*, 35 N.J. Super. 1, 113 A.2d 53 (App. Div. 1955). There the insured sought to collect on a windstorm policy for damages incurred to a beachhouse during a storm. The court first noted the possibility that damages to the house may have been caused by both wind and rain, and stated as follows:

> Loss due to the effect of causes both within and outside the coverage, operating conjointly, is generally considered not recoverable under this kind of provision.

35 N.J. Super. at 6; 113 A.2d at 56.

The court then made the following holding:

> It was the burden of plaintiffs to show by a fair preponderance of the evidence that the damages to their building were within the coverage and not encompassed by the exclusions of liabliity set forth in the

> contracts they purchased. . . . We think they failed to adduce proof sufficient to enable the district court judge, sitting as a finder of the facts, to conclude they had met that burden, except with respect to the damage to the shingles and to the antenna.

35 N.J. Super. at 7; 113 A.2d at 57.

Numerous other decisions from both the New Jersey [12] and Illinois [13] courts have upheld this principle in a variety of contexts.

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[12] *See, e.g., Habedank v. Atlantic Casualty Ins. Co.*, 128 N.J.L. 338, 25 A.2d 889 (1942) (injured party seeking to recover on automobile owners' policy must establish not only that driver was given permission to drive the automobile, but that automobile was being operated for "commercial use"); *Kennedy v. United States Fidelity & Guaranty Co.*, 113 N.J.L. 431, 174 A. 531 (1934) (burden rests with plaintiff to establish coverage under a policy for accidental death or injury sustained through external, violent, and accidental means); *Warren v. Employers' Fire Insurance Co.*, 100 N.J. Super. 464, 242 A.2d 635 (App. Div. 1968), *rev'd on other grounds* 53 N.J. 308, 250 A.2d 578 (1969) (under homeowner's policy insureds had burden of proving date and amount of any loss sustained); *Trad Television Corp. v. Hartford Accident & Indemnity Co.*, 35 N.J. Super. 36, 113 A.2d 47 (App. Div. 1955), *cert. dism'd*, 19 N.J. 330, 116 A.2d 827 (1955) (burden was on insured to establish that money was lost while being conveyed by a "messenger" for purposes of coverage under policy); *Parker v. Niagara Fire Ins. Co.*, 30 N.J. Super. 585, 105 A.2d 677 (App. Div. 1953) (primary burden rests on insured to establish prima facie case that loss from automobile engine seizure was "direct and accidental" under policy); *Winter v. Metropolitan Life Ins. Co.*, 129 N.J.L. 187, 28 A.2d 657 (1942) (failure to establish that hospitalization of insured within two years prior to issuance of policy was not for a serious matter bars beneficiary from collecting under the policy).

[13] *See e.g., Hays v. Country Mutual Insurance Company*, 28 Ill.2d 601, 192 N.E.2d 855 (1963) (claimant under policy had burden of proving that operator of automobile had permission of owner-insured); *Yates v. Bankers Life & Casualty Co.*, 415 Ill. 16, 111 N.E.2d 516 (1953) (claimant under policy had burden of showing that death of the insured resulted solely from bodily injury caused by accidental means); *Soukup v. Halmel*, 357 Ill. 576, 192 N.E. 557 (1934) (proof by claimant that operator of automobile had permission of owner-insured ". . . . lies at the foundation of plaintiff's

Because this case was tried in the United States District Court for the Eastern District of Michigan, we note that the court of appeals's reversal of the burden of proof in this case would be no less defective had the court applied Michigan law in making its ruling. As is true in Illinois and New Jersey, the Michigan courts follow the general rule that the burden of proof is on the insured to establish coverage under the policy.[14] *Grand Rapids Auctions, Inc. v. Hartford Accident & Indemnity Co.*, 23 Mich. App. 389, 178 N.W.2d 812 (1970) is particularly germane, because the insured lost its case due to inability to prove that the insured event had occurred within the three-month period necessary to invoke coverage.

> Certainly plaintiff is not entitled to recover from the defendant for losses which occurred during any period except that in which the bond was in force, September 24 to December 24, 1963.
>
> A review of the record convinces us that the testimony as presented by the plaintiff did not establish the

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right to recover under the policy."); *Robinson v. Metropolitan Life Ins. Co.*, 74 Ill.App.3d 698, 393 N.E.2d 738 (1979) (burden of proof was on plaintiff to prove that cause of death was accidental under the terms of the policy); *Continental National American Group v. Vaicunas*, 26 Ill.App.3d 835, 325 N.E.2d 747 (1975) (in a declaratory judgment brought by insurer, defendant-claimant had burden of showing that a friend's automobile was not furnished to him for regular use, and that he was thus covered under his father's policy).

[14] *See, e.g., Cummins v. John Hancock Mut. Life*, 337 Mich. 629, 60 N.W.2d 490 (1953) (burden of proving accidental death and negating suicide is upon plaintiff in suits on accident policy); *Koycheff v. Mutual Benefit Health and Accident Association*, 305 Mich. 660, 9 N.W.2d 883 (1943); *Lukaswiecz v. General American Life Ins. Co.*, 281 Mich. 65, 274 N.W. 712 (1937) (burden of proof on plaintiff to establish that insured became totally and permanently disabled before group insurance certificate lapsed); *Williams v. Detroit Fire & Marine Ins. Co.*, 280 Mich. 215, 273 N.W. 452 (1937) (insured had burden of proving that damage to his building was caused by a windstorm as described in insurance policy.)

> amount of loss which could be directly connected to that three month period. . . . Upon retrial, we order that only those losses which can be directly attributed to the three month period in which the bond was in force may be pleaded and proved. The burden of identification of losses is, and should be, upon the plaintiff.

23 Mich. App. at 396; 178 N.W.2d at 815-816.

Given the quantity and clarity of state decisional authority on the issue of burden of proof in cases such as this, it can hardly be argued that the court of appeals was confronted with a novel issue of state law;[15] nor can its reversal of the burden of proof be justified as an attempt by the court to interpret the law of New Jersey, Illinois, or Michigan as the highest courts of those states would interpret it.[16] Indeed, the only explanation which can be

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[15] If there is no state rule on a point, or if the state law is unclear, the federal diversity court is free—indeed, required—to make an informed assessment of how the highest court of the state would rule, based on rulings in analogous areas, holdings by courts in sister states, and whatever other sources of illumination are available. Here, however, the state rule is clear and firmly established. ". . . [T]he duty of United States courts in such cases is to ascertain, construe, and apply static state law; not to limit, modify, or repeal state doctrine." *Rehm v. Interstate Motor Freight System*, 333 F.2d 154, 157 (6th Cir. 1943). *See also, Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204-05 (1956), where 1910 and 1803 Vermont decisions were held to be binding on the federal diversity court because "there is no later authority from the Vermont courts" and "no fracture in the rules announced in those cases. . . ."

[16] It is equally apparent that the court's reversal of the burden of proof cannot be explained under Rules 301 and 302 of the Federal Rules of Evidence. Under Rule 302, in a case in which "State law supplies the rule of decision," state law controls the effect to be given to a presumption. The notes of the Advisory Committee regarding Rules 301 and 302 also make it clear that federal courts must still apply state rules regarding burden of proof where, as here, "a substantive element of the claim or defense" is involved. *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959).

given for the court's action is that it simply ignored its obligations under the *Erie* doctrine and fashioned a federal common law rule of burden of proof.

Recent decisions of this Court clearly forbid this *sua sponte* creation of federal common law under these circumstances. As was true in *Miree v. Dekalb County, Georgia*, 433 U.S. 25 (1977), this litigation ". . . is among private parties and no substantial rights or duties of the United States hinge on its outcome." *Id.* at 31. It does not involve ". . . a significant conflict between some federal policy or interest and the use of state law. . . ." *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966), or a federal interest sufficient to justify the abrogation of settled state law in favor of a federal common law rule. There being no federal statute, treaty, or constitutional provision at odds with the use of the state rule concerning burden of proof, the state rule must be followed.

> We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

What the court below has done is devise its own law regarding burden of proof to conform with its own, erroneous view of the rights and liabilities of the parties in this case. The constitutional infirmity of its so doing is clear. For this Court to allow such caprice to go uncorrected would destroy all certainty in the legal relationships between insurers and insureds, both in cases involving asbestos and in cases involving other risks.

C. The Sixth Circuit's Departure From Established Insurance Principles Will So Seriously Impair The Administration Of Justice In The Federal Courts As To Require Correction Pursuant To This Court's Supervisory Powers

Any litigant seeking review of a court of appeals decision by writ of certiorari must be mindful of Justice Frankfurter's admonition that "litigation allowed to be brought into the federal courts solely on the basis of diversity of citizenship is rarely of moment except to the parties." *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 448 (1959) (Frankfurter, J., dissenting). We are mindful that the purpose underlying review of such cases by this Court is not the correction of errors of consequence only to the litigants. It is, rather, "the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest. . . ." Taft, The Jurisdiction of the Supreme Court under the Act of February 13, 1925, 35 Yale L. J. 1, 2 (1925), quoted in *Dick*, *supra* at 453-54.

This is such a case. Wholly apart from the Sixth Circuit's constitutional error in refusing to follow well established state law concerning the burden of proof, the new insurance doctrine it has created will so severely disrupt the administration of justice in the thousands of asbestos cases which pend in the federal courts "as to call for an exercise of this Court's power of supervision." Rules of the Supreme Court, Rule 17.1(a).

As the district court's opinion in the *Migues* case, *supra* at 8, reflects, the asbestos litigation which began in the mid-1970s has already created a strain for the federal judiciary unparalleled in our country's history. By their sheer number the thousands of asbestos cases which clog the federal courts invest the instant controversy with a societal importance probably beyond that ever presented in

a contract dispute.[17] How the insurance coverage question is resolved will directly affect what companies are responsible for preparing, trying, settling, and appealing what the Sixth Circuit has rightly described as "an avalanche of law suits against the entire asbestos manufacturing industry."

The court below was thus right to be concerned about the "need for us to arrive at an administratively manageable interpretation of the insurance policies—one that can be applied with minimal need for litigation." 633 F.2d at 1218. The novel insurance regime which the court created for asbestos product litigation, however, will have precisely the opposite effect. For example:

1. Under the Sixth Circuit's holding, each of Forty-Eight's insurers during the past twenty-six years is responsible for defending Forty-Eight in the thousands of underlying actions alleging exposure to its products. In addition, Forty-Eight by the same logic is responsible as to the period when it had no insurance. What the Sixth Circuit has not discussed, however, is which of these com-

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[17] "As of the date of the district court opinion [May 4, 1978], Forty-Eight had been named as a defendant in 251 'asbestos suits.' By the end of 1978, Forty-Eight had over 800 such suits filed against it. By the summer of 1979, over 1,370 cases were filed." 633 F.2d at 1215. Pursuant to an Interim Agreement entered into by the parties and approved by the district court on November 9, 1977, the carriers are defending the cases against Forty-Eight on a manifestation basis pending final decision of this case. Liberty is now defending 5,316 cases against Forty-Eight under that arrangement.

Cf. "Asbestos Injury Suits Mount, with Broad Business Impact," New York Times, July 3, 1981, Page 1:

> Damage claims by workers exposed to asbestos and by their families now constitute the largest, and potentially most costly, block of product liability litigation ever to confront American industry.
>
> * * *
>
> The worst may be yet to come.

panies will determine how each of these thousands of cases will be defended. Each case will require myriad tactical decisions, such as whether the defendants should put up a common front or cross-claim against one another, whether the case should be tried or settled, at what amounts settlements should be made, whether a given defendant should vigorously defend the action or "coattail" on the efforts of another defendant, and whether decisions should be appealed. If all six of the parties involved in this litigation are responsible for these cases, presumably they are all entitled to hire counsel and exercise these prerogatives. How do they exercise them? By majority vote? Majority in terms of number of companies, or number of years at risk? What about the rights of the companies which do not agree with a defense or appeals strategy favored by their brethren? Even if there is a way to resolve these questions, and neither the Sixth Circuit nor anyone else has pointed one out yet, the tangle they will create will turn every trial into a logistical nightmare populated by more lawyers than any courtroom can hold, as manufacturers and insureds move to protect their interests in the underlying cases.[18] Although some rule is necessary to deal with these problems, such a rule could emerge only through the pronouncement of a purely legislative fiat. There is not a word in the insurance agreements, nor in any decisional law, which speaks to these problems. The burden which dealing with these unanswerable questions will impose upon the lower federal courts is obvious.

2. Another problem which the nation's district courts will have to sort out, perhaps several thousand times over,

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[18] The problems would be serious if only one defendant were sued in each case. However, "[t]he typical complaint names a multitude of companies which manufactured asbestos-containing products over the years." 633 F.2d at 1215. If each defendant is represented by all of its carriers since the 1940s, depositions will be held in stadiums, not offices.

is how to deal with the conflicts of interest which are inherent in the Sixth Circuit's collegial approach to insurance coverage. Under the Sixth Circuit's reasoning, each lawyer whom an insurer hires to defend the manufacturer is also entitled to show, if he can, that exposures to that manufacturer's products took place during someone else's coverage, or when there was no coverage. Can the same lawyer who is defending the insured against the claimant try to establish facts which would vitiate coverage and make the case the insured's responsibility? If not, does each carrier hire two sets of lawyers for each case? A negative answer puts counsel in the awkward position of serving two masters whose interests may diverge.[19] An affirmative answer makes the procedural quagmire that much deeper. The Sixth Circuit refused to address the question. The district courts which will now inherit it will not have that luxury.

3. Another problem created by the Sixth Circuit's decision is that it will become far more difficult to settle asbestos cases if that court's opinion is accepted. As the court pointed out, the time when exposures to a specific product took place is irrelevant in the underlying claimant's case, and no one has heretofore been concerned with establishing which manufacturer's products were used when.

> In an asbestosis case, however, under *Borel*, all that an injured worker need do is prove that a given manufacturer's products contributed to the worker's asbestosis *at any time*. That is enough to trigger joint and several liability.

633 F.2d at 1225, n.27; emphasis added. Until now, the same thing was true from an insurance standpoint. An

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[19] If they do, counsel must withdraw from the case altogether. Such withdrawal will generally come only after considerable discovery, leaving the client, the other litigants, and the trial court high and dry.

insurer had no need to worry whether the record showed an exposure to its insured's particular asbestos-containing cement in 1953, 1955, or any other year, in connection with settling a case on behalf of its insured, since that had nothing to do with whether it should defend and pay for the case.

Under the holding below, however, the timing of exposures is suddenly of critical importance. If the insured's product was not used while policy A was in force, policy A does not apply. When cases are settled (as most of them are) there is no record as to which exposures took place during which years. The insurer which issued policy A is thus free to refuse to contribute toward the defense and settlement of the case, on the basis that there has been no showing of the facts necessary to implicate its policy. It then befalls the parties which have contributed to the settlement kitty to sue the insurer under policy A to force it to contribute its share. *Cf. Walters v. American Insurance Co.*, 185 Cal. App.2d 776, 8 Cal. Rptr. 665, 671 (1960):

> . . . [I]t is also established that where a settlement of litigation has been made and no judgment establishing the liability of the insured rendered, the question of insurer's liability to defend remains open for adjudication in a later proceeding.

As a result, the Sixth Circuit's approach to coverage will have two likely effects upon the lower federal courts, both of them damaging. One is that settlements will be inhibited because none of the companies involved will know what its own share of the liability will be, without time-consuming discovery directed to which exposures occurred during which policies. The second is that every time a case is settled, a follow-up lawsuit may result among the insurance carriers and the insured to parcel out responsibility for it. The Sixth Circuit said nothing about this problem,

either, but obviously neither scenario bodes well for a federal judiciary already struggling with a tort problem which has run amuck.

4. The Sixth Circuit's departure from settled insurance principles will multiply the litigation surrounding the asbestos area in still another way. As the court's opinion acknowledges, no one concerned, insurers, brokers, or insureds, has ever imagined that policies which expired decades ago would have any bearing on diseases which are occurring today. They indicated as much in the most irrefutable manner: they threw the policies away. Now that the Sixth Circuit has revivified those policies, the courts and litigants are faced with a most perplexing question: what did those policies contain? The morass into which this commercial reality will plunge the nation's trial courts is that every insurance dispute will be side-tracked for burdensome and time-consuming discovery directed to finding out what companies insured whom, pursuant to what terms, in past decades.[20] In one pending asbestos coverage action,[21] for example, although the plaintiff filed its complaint on March 6, 1980, the 16 months since have been devoted to nothing of substance other than depositions from Pennsylvania to Australia to find out whether one of the carriers insured the plaintiff in the 1930s and 1940s. Similarly, in the *Keene* litigation, *supra* at 6, the district court held a two-day hearing on September 25-26, 1980 dealing entirely with whether one of the insurers had issued product liability coverage to the plaintiff between 1948

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[20] Among the questions that will have to be faced are who issued policies to whom, whether those policies had product liability coverage (which was not common until the 1960s), what the limits of the policies were, and what amounts were paid by the insurers against those limits in the years the policies were in effect.

[21] *Armstrong Cork Company v. Aetna Casualty & Surety Company, et al.*, Los Angeles Superior Court No. C315367, Judicial Council Coordination Proceeding No. 1072.

and 1959. Predictably, although there were indications that liability policies of some sort had been issued for this period, no one was able to find copies of the policies, notwithstanding considerable discovery directed to this point. The same expensive and fruitless endeavor will be forced upon countless other district court judges if the Sixth Circuit's ruling stands.

CONCLUSION

Without even noting the problem it was creating, the Sixth Circuit, by *sua sponte* reversing a burden of proof firmly established under governing state law, has violated the constitutional rule which underlies *Erie* and which has been applied specifically to burden of proof cases in numerous decisions of this Court. When that fundamental error is corrected, the remainder of the court's opinion collapses. Rather than "maximizing" coverage for the insured, it places the insured in an impossible predicament which assures that it will never be able to establish coverage. The traditional manifestation approach to coverage accordingly remains the theory of choice for diseases associated with asbestos just as with all of the other cases in which it has historically been applied.

At the beginning of its opinion the court below admitted that this case "presents a novel and important question" not faced by an appellate court heretofore. 633 F.2d at 1213, 1223. In the middle of its opinion the court several times acknowledged the logic underlying the manifestation position. "We concede that appellants have a good argument. . . . [T]here are solid arguments to support the manifestation theory. . . . These cases certainly appear to provide support for the manifestation theory." *Id.* at 1218, 1219, 1221. At the conclusion of its opinion the court below once more gave testimony to the questionable legitimacy of its holding.

> Because the insurance industry did not fully appreciate [22] the extent of potential liability for asbestos-caused injuries, we have this impossible problem before us. There is no truly satisfactory solution we can make. Each theory has its flaws and anomolies.

Id. at 1226.

An "unsatisfactory" solution which is at odds with traditional legal principles, and which adds greatly to the number of issues which will have to be litigated in an ocean of tort cases which already threatens to drown some of the nation's district courts, should not be countenanced by this Court. The writ should be granted.

Respectfully submitted,

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[22] This accusation is misleading. It is equally fair to say that the manufacturers who were making asbestos-containing products did not "fully appreciate" the liability they would face, or they would have at least kept their old policies. The same thing might be said about the government. Much of today's asbestos litigation is attributable to widespread use of asbestos in Navy shipyards during World War II, which reports done for the government at the time described as "a relatively safe operation." *Borel*, 493 F.2d at 1084.

TABLE FOR APPENDICES

Appendix A 1a
Opinion of United States Court of Appeals for the Sixth Circuit in *Insurance Company of North America v. Forty-Eight Insulation, Inc., et al.*, 633 F.2d 1212 (Nos. 78-1322/23/24/25/26, October 21, 1980)

Appendix B 42a
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APPENDIX A

INSURANCE CO. OF NORTH AMERICA,
Plaintiff-Appellant,

v.

FORTY-EIGHT INSULATIONS, INC.,
Defendant-Appellee-Cross-Appellant,

and

Affiliated FM Insurance Co., Illinois Nat'l Insurance Co., Liberty Mutual Insurance Co., Defendants-Appellants,

and

Travelers Indemnity of Rhode Island, Defendant-Appellee.

Nos. 78-1322 to 78-1326.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 10, 1979.

Decided Oct. 21, 1980.

Before KEITH and MERRITT, Circuit Judges, and PECK, Senior Circuit Judge.

KEITH, Circuit Judge.

This case presents a novel and important question of insurance law. A manufacturer of asbestos products faces huge potential liability because of numerous lawsuits filed around the country by persons who inhaled asbestos fibers allegedly manufactured by the company. The claimed basis for liability is that the asbestos manufacturer failed to warn asbestos workers and other ultimate users of its products that asbestos waas a dangerous product which, if

inhaled, could cause an early death from cancer or other disease. The company had various products liability insurance policies over a twenty-year period of time. These policies were issued by five different insurance companies. Which of the insurance companies is obligated to provide a defense to the numerous lawsuits? And, assuming the manufacturer is found liable, which of the insurance companies must cover the judgment? These are the issues presented by this case. They are not easy to resolve and they have split the American insurance industry, many of whose member companies have filed amicus curiae briefs.

FACTS

Background

From 1923 until 1970, Forty-Eight Insulations, Inc. manufactured products which contained asbestos. Asbestos is a mineral compound which has high tensile strength and flexibility. Asbestos also withstands high temperatures. For these reasons, asbestos has many commercial uses, especially in the construction industry. Asbestos is used in home insulation, cements, paints and tile.

The problem is that tiny asbestos particles can become airborne when asbestos is mined and processed, when asbestos materials are used at a construction or other site, and when old buildings containing asbestos are demolished. When these asbestos particles become airborne, a number of them are inhaled by persons in the area. The asbestos particles are deposited in the lungs. If, over the years, enough asbestos particles are inhaled, they can cause a variety of pulmonary diseases. Medical science is not certain exactly how these diseases develop, but there is universal agreement that excessive inhalation of asbestos can and does result in disease. These asbestos-caused diseases

include mesothelioma, broncheogenic carcinoma (lung cancer), and asbestosis.[1]

The most common disease is asbestosis. Asbestosis occurs when fibrous long tissue surrounds small asbestos particles in the lungs to prevent the particles from moving around or causing irritation to neighboring cells. Ordinarily, this encapsulation of the asbestos particles is a good thing. However, if too many asbestos particles are inhaled, then the encapsulation process diminishes pulmonary function and makes breathing difficult. When this occurs, the disease of asbestosis is said to be present.

Asbestosis is a progressive disease. It ordinarily takes years of breathing asbestos fibers for asbestosis to occur. And asbestosis varies greatly from person to person. Obviously, the concentration of the asbestos in the work environment is a critical factor. The more asbestos fibers a worker inhales, the more quickly a worker will contract asbestosis. Even so, there are many vagaries. The average human lung has much excess capacity and can absorb a fair amount of asbestos particles. How much varies. Many

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[1] Throughout this opinion, we shall be discussing the liability situation as it relates to asbestosis. The reason is that mesothelioma and lung cancer present very different considerations. Mesothelioma is cancer of the mesothelial cells which line the chest wall and surround the organs of the chest cavity. This cancer is associated with the inhalation of asbestos fibers. Mesothelioma generally does not occur until 20 years or more after there has been excessive inhalation of asbestos. Mesothelioma is easily discovered and diagnosed shortly after it develops. Unfortunately, there is no satisfactory treatment for the disease, and the victim almost always dies within several years of the tumor's initial development.

Lung cancer's development is similar to that of mesothelioma. However, the correlation between the inhalation of asbestos and the development of lung cancer is not established. Rther, it appears that inhalation of asbestos accelerates the development of lung cancer in persons who smoke.

construction workers exposed to asbestos for forty years or more do not become diseased. Others, exposed to asbestos for shorter periods of time at lower concentrations, do contract asbestosis.[2]

The typical person who has contracted asbestosis is a worker who was employed in an industry in which many asbestos-laden products were used, e.g. construction. Usually, the worker has been exposed to asbestos particles for many years at least ten, and generally for twenty or more.

By the late 1960s so many workers had contracted asbestosis that manufacturers began to cut back on the production of asbestos-containing products. Forty-Eight Insulations stopped using asbestos in its products in 1970. However, these remained the question of liability for the past sale of these products containing asbestos.

Suits on behalf of the injured workers were filed against the asbestos manufacturers. The workers' theory of liability was that under Restatement Torts 2d § 402(A), asbestos was an inherently dangerous product which the manufacturers had to warn them about. The workers claimed that the manufacturers had not so warned them and that therefore the workers should recover. To the extent that it was impossible to tell which particular manufacturer was responsible, they contended that all relevant asbestos manu-

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[2] Two leading articles in the medical literature on asbestosis are Selikoff, Bader, Bader, Churg, and Hammond. "Asbestosis and Neoplasis," 42 Am.J.Med. 487 (1967); Selikoff, Churg, and Hammond, "The Occurrence of Asbestosis among Insulation Workers," 132 Ann. New York Acad. Sci. 139 (1965). A good discussion of asbestosis is contained in *Borel v. Fibreboard Paper Products*, 493 F.2d 1076, 1083 85 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974).

facturers should be jointly and severally liable.[6]

The above-outlined theory of liability was endorsed in the leading case of *Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). *See* Prosser, Law of Torts, § 52 at 315-20 (4th Ed. 1971). *Borel* has triggered an avalanche of law suits against the entire asbestos manufacturing industry. The typical complaint names a multitude of companies which manufactured asbestos-containing products over the years. One of these companies is Forty-Eight Insulations. As of the date of the district court opinion, Forty-Eight had been named as a defendant in 251 "asbestos suits". By the end of 1978, Forty-Eight had over 800 such suits filed against it. By the summer of 1979, over 1,370 cases were filed.

The Instant Case

In recent years, most manufacturers have taken out insurance policies to protect them against products liability suits. Before 1955, Forty-Eight was apparently self-

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[6] Joint and several industry-wide liability is itself an interesting question. In asbestosis cases, plaintiff-workers in underlying lawsuits have been able to show that various asbestos manufacturers actually applied the asbestos products to which the workers were exposed. However, in some jurisdictions, joint and several industry-wide liability can be established even if a plaintiff cannot show taht a particular company's or companies' products were actually involved. The mere likelihood that a company provided a defective product to the plaintiff may be sufficient to trigger liability. *See Sindell v. Abbott Labs, Inc.*, 26 Cal3d 588, 163 Cal.Rptr. 132, 607 P.2d 924 (1980); *Abel v. Eli Lilly & Co.*, 94 Mich.App. 59, 289 N.W.2d 20 (1979); *Hall v. DuPont*, 345 F.Supp. 353 370-80 (E.D. N.Y. 1972); *See also* Restatement 2d, Torts § 433(B) (1972); Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L.Rev. 963 (1978).

insured.[4] Starting in that year, Forty-Eight was covered by various insurance policies issued by different companies. The Insurance Company of North America (INA) insured Forty-Eight from October 31, 1955 to October 31, 1972 with six consecutive insurance policies whose coverage limits varied. Affiliated FM Insurance Company (Affiliated FM) insured Forty-Eight from October 31, 1972 to January 10, 1975. Illinois National Insurance Company (Illinois National) insured Forty-Eight from January 10, 1975 to January 12, 1976. Travelers Indemnity Company of Rhode Island (Travelers) insured Forty-Eight from January 12, 1976 to November 8, 1976. Liberty Mutual Insurance Company (Liberty Mutual) has insured Forty-Eight since that date.

The various policies issued by the above companies have varied in their coverage over the years.[5] However, each of the policies uniformly defined what it covered, when coverage applied and the definitions of the various terms used.[6] The reason is that the insurance industry uses

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[4] Forty-Eight thought that it did have insurance coverage before 1955. However, any such policies were lost and/or destroyed and Forty-Eight was unable to prove it had any coverage before that date.

[5] See the breakdown which is reproduced as appendix "A" to this opinion.

[6] Coverage limits ranged from $300,000 (per accident) $100,000 (per person) from 1955 to 1962; $500,000 (person accident) from 1962 to 1973; $400,000 (per accident) from 1973 to 1975; $300,000 (per accident) in 1976; $1,000,000 (per accident) from 1976 to the present. In addition, starting in 1976, Liberty Mutual's policy contained a $100,000 per person deductible for asbestosis cases. Since most asbestosis cases have been settling for less than $100,000, this means that, as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976. A chart containing each of the policies and their coverage is redroduced as appendix "B" to this opinion.

standardized language in its general liability policies. Thus each of the policies taken out by Forty-Eight contained the same relevant language. This language was as follows:

> [The insurer] will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this policy applies caused by an occurrence.[7]
>
> "Bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.
>
> "Occurrence" means an accident, including injurious exposure to conditions which results, during the policy period, in boidly injury. . . .

The above-cited policy language causes little difficulty in the ordinary case. Asbestosis, however, presents thorny problems since it does not clearly fit within the above language. A worker who contracts asbestosis and sues Forty-Eight and/or other asbestos manufacturers must establish liability and injury in order to win a judgment. If the worker succeeds in his suit and Forty-Eight is directed to pay, then it is clear that the above-cited insurance coverage is triggered.

But which insurance company has to pay the judgment? At first glance, it would appear that the insurance company which provides coverage when asbestosis is diagnosed should pay. However, asbestosis is a slowly progressive, insidious disease. As more and more asbestos particles settle

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[7] In 1966, the provision providing coverage for liability "caused by an occurrence" was changed from the previous provision which provided coverage for liability "caused by accident". This case, however, centers on interpretation of the term "bodily injury". No party to this suit ascribes any significance to this 1966 change as far as this suit is concerned.

in the lungs over years of exposure, the disease worsens. At some point, asbestosis interferes with gas exchange in the lungs and clearly manifests itself. It is thus arguable that a worker's asbestosis "occurred" during the many years that the worker was breathing in tiny asbestos particles and accumulating them in his lungs.

This case principally concerns a dispute among Forty-Eight's different insurance carriers over the years as to which carrier or carriers is liable under the above-cited policy provisions. INA filed this diversity action in the district court, seeking a declaratory judgment on this issue.

I.

We are called upon in this case to construe uniform provisions in widely-used Comprehensive General Liability (CGL) insurance policies. We are presented with two different theories of construction.*

INA, Affiliated FM, Illinois National and Liberty Mutual, supported by several amici curiae, advocate the manifestation theory of liability. Under this theory, bodily injury in a case of asbestosis could not be deemed to have occurred until the asbestosis manifests itself. The date of manifestation is the date when the worker knew or should have known he has asbestosis, or the date that asbestosis is medically diagnosed, whichever came first. Accordingly,

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* The issues presented by this case have been the subject of varying judicial interpretation and commentary. *See Porter v. American Optical*, (E.D.La. No. 75-2202, Dec. 23, 1977), on appeal to the Fifth Circuit (manifestation theory adopted); *American Motorists Ins. Co. v. E. R. Squibb*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (Sup.Ct. 1978); (same); *Tenneco Chemicals v. Employers Mut. Liab. Ins. Co.* (S.D.N.Y. No. 76 Cir. 809, April 8, 1977) (exposure theory adopted); Comment, Liability Insurance for Insidious Diseases: Who Picks up the Tabs? ... Ford.L.Rev. ... (1980); Note, 26 Wayne L.Rev. 1127 (1980).

under the manifestation theory, those insurance companies on the risk when asbestosis manifests itself must pay any resultant judgment of liability. Simply put, the manifestation theory is that no "bodily injury" took place until asbestosis became apparent.

Forty-Eight and Travelers, supported by numerous amici curiae, advocate the exposure theory. They argue that when asbestosis manifests itself has nothing to do with when "bodily injury" took place. They emphasize that the medical testimony establishes that tissue damage starts to occur shortly after the initial inhalation of asbestos fibers and that the tissue damage worsens as the victim breathes in more and more asbestos fibers. The advocates of the exposure theory characterize asbestosis as a series of continuing injuries to the body which accumulate to cause death or disability. Under this theory, asbestosis is a "continuing tort" and all insurance companies which provided coverage from the time of the worker's initial exposure to time of the manifestation of the disease are jointly and severally liable to defend and to indemnify Forty-Eight if liability is found.

The district court adopted the exposure theory.[9] The court first noted that many of the insurance companies that now advocate the manifestation theory had initially embraced the exposure theory. The court found this initial conduct instructive as to the proper meaning of the policy provisions.

The principal basis for the district court's position, however, was the medical evidence. The medical testimony

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[9] More accurately put, the court adopted a version of the exposure theory. In its cross-appeal, Forty-Eight advocates a series of changes to the district court's exposure theory. These issues are discussed below in part III.

established that "each tiny deposit of scar-like tissue causes injury to a lung". From this, the court reasoned that "each such insult-causing injury is an 'occurrence' for the purpose of determining which coverage applies." 451 F.Supp. 1230, 1239 (E.D.Mich. 1978).

Finally, the district court thought that the exposure theory best served the expectations of the contracting parties. The court emphasized that an injured worker who sues Forty-Eight makes out a prima-facie case by showing injury and exposure to Forty-Eight's products. The plaintiff in such an underlying lawsuit can recover even if he cannot pinpoint the exact time when each injury occurred. Under *Borel, supra*, all asbestos manufacturers to whose products a worker was exposed are jointly and severally liable for the resultant, cumulative injury. By analogy, the district court reasoned that the manufacturers' insurance coverage should parallel their liability, and that each insurance company should be jointly and severally liable to defend and indemnify the manufacturer. Otherwise, concluded the district court, the manufacturer's insurance coverage would be illusory.

All parties have appealed.

II.

In each case where a plaintiff sues an asbestos manufacturer, a hearing could be held to determine at what point the build-up of asbestos in the plaintiff's lungs resulted in the body's defenses being overwhelmed. At that point, asbestosis could truly be said to "occur". From then on, all companies which insured the manufacturer would be treated as being "on the risk".[10]

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[10] Judge Merritt's ingenious opinion tries to find this optimal point by looking to X-ray diagnosis and establishing a 10-year point. The problem with this innovative theory is that it disregards the

The only problem with this Solomonian interpretation is that no one wants it. The principle reason is cost. If medical testimony as to asbestosis' origin would have to be taken in each of the thousands of asbestosis cases, the cost of litigation would be prohibitive. This appears to be especially true since many of the asbestosis cases are settled before trial. In addition, it is almost impossible for a doctor to look back and testify with any precision as to when the development of asbestosis "crossed the line" and became a disease.

The only thing on which all parties agree is that there is a need for us to arrive at an administratively manageable interpretation of the insurance policies—one that can be applied with minimal need for litigation. Reaching such a beneficial result is certainly desirable, but it greatly complicates our task. In the real world, there are few Solomonian possibilities. And, as we have just seen, those that do exist are often impractical. Thus, we must turn to the arguments advanced on appeal.

A.

[1] As noted above, the medical testimony is not in dispute. Asbestosis is a slowly progressive disease. Injury, in the sense that there is tissue damage, occurs shortly

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medical testimony that "bodily injury" takes place at or shortly after inhalation. Moreover, this theory places too much weight on the state of the art in medical diagnosis. As Judge Merritt acknowledges, x-ray diagnosis is simply one tool used to find whether a worker has asbestosis. The medical experts termed it a "crude" tool. In contrast, a lung biopsy would reveal damage shortly after initial exposure. Of course, this is not currently feasible. But what if medical advances make biopsy or a similar procedure feasible? We prefer to say that bodily injury is bodily injury from the beginning, rather than to say that bodily injury is bodily injury ten years from initial exposure because that's when an x-ray shows it.

after the initial inhalation of aasbestos fibers. It was because of this early tissue damage that the district court concluded that the insurance companies would be liable from the date of a worker's initial exposure to asbestos. The district court thus equated the "bodily injury" which is covered by the insurance policies with the development of the tiny, scar-like tissue in the victim's lungs. Because each additional inhalation of asbestos fibers results in the build-up of additional scar tissue in the lungs, the district court deemed the "bodily injury" to occur whenever asbestos fibers were inhaled.

The medical testimony strongly supports the exposure theory. The appellants—who are proponents of the manifestation theory—seek to blunt the significance of this testimony. They agree that tissue damage takes place shortly after initial inhalation of asbestos fibers. However, they contend that this is irrelevant. Appellants argue that what should matter under the contract is *compensable* "bodily injury". They rely heavily on analogous insurance law cases. These cases will be discussed below.

We concede that appellants have a good argument. How one views "bodily injury" or "disease" depends on how one defines those terms. The doctors who testified openly stated that this was so. Dr. George Wright, for example, testified as follows:

> Well, you get, first of all, you get into something of a matter of semantics. What is a disease? . . . At what stage of quantitative abnormality does something become a disease? Its a judgment call.

Dr. Wright explained that a physician or biologist might not regard asbestosis as a disease so long as it was not diagnosable by x-ray or if the patient had no symptoms. In contrast, a histologist, who studies tissue systems, would

regard asbestosis as a disease from the very beginning. Dr. Wright explained:

> Now, is tissue injury a disease? You go to the histologist and he will say, "You bet your boots it is a disease". He will find asbestos fibers, asbestos bodies, and he will say that is asbestos[is], period. That is a disease. And he can do that long before the clinician can do it.

This "judgment call" is what is before us for review. As a matter of contract law, in this case, when did the disease of asbestosis occur?

Appellants urge that date of manifestation is the preferable interpretation of when bodily injury occurs. Appellants claim that this interpretation best serves the intent of the parties, which is to treat cumulative disease cases the same as ordinary accident cases. Otherwise, argue appellants, the limits and deductibles contained in the various insurance policies make no sense.[11] Appellants emphasize that manifestation is the only theory that reasonably allows the operation of the insurance industry's claims machinery and administration of suits and coverage. In a nutshell, the proponents of the manifestation theory urge that we treat asbestosis the same as any other disease and that we not make any "special rules" for the cumulative disease situation which asbestosis presents.

We cannot agree. Cumulative disease cases *are* different from the ordinary accident or disease situation. First, the underlying theory of tort liability is that the asbestos manufacturers continually failed to warn the asbestos workers and that, as a result of this, continuous breathing of asbestos particles allowed asbestosis to progress to the point where it caused death or injury. The insurance policies before us are comprehensive general liability poli-

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[11] See fn. 28, *infra*.

cies which are designed to insure the manufacturer against products liability suits. The contracting parties would expect coverage to parallel the theory of liability. Otherwise, as the district court noted, the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself.[12]

Second, a question might exist as to whether the microscopic tissue injury which occurs upon initial inhalation of asbestos should be defined as the occurrence of a "disease" or "bodily injury". However, there is universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred. No doctor would say that asbestosis occurred when it was discovered. As Dr. Wright testified:

> Suppose a man never goes to see anybody or never has a cheset [x-ray] film made or anything else done until he is far advanced and the diagnosis is then made on that date. Well, nobody, I think, would ask you to believe that is when the disease began. That is when the diagnosis was made, but it was a temporal phenomenon based on things having nothing to do with tissue injury; namely, when did the man go to see a doctor so the diagnosis could be made?

Third, although there are solid arguments to support the manifestation theory, we are bound to broadly construe

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[12] In its brief, INA states that the district court's reliance upon the *Borel* case "as controlling precedent for the interpretation of insurance contracts is almost embarrassing. Contractual language controls contractual interpretation. Rules of Tort do not." INA oversimplifies the issue in its effort to discredit the district court. The insurance policies which we must interpret are meant to protect a manufacturer from products liability judgments. The legal theory used in the underlying tort suits is certainly relevant in helping a court define what was meant by the policy language.

the insurance policies to promote coverage. This is a diversity case and we must apply Illinois and New Jersey law. We adopt the district court's cogent discussion of this issue:

> In a contract diversity action such as this, Michigan conflict of law rules require the application of the law of the place where the insurance policies were issued and countersigned. *Chrysler Corp. v. Insurance Company of North America*, 328 F.Supp. 445 (E.D.Mich. 1971). The parties agree that Illinois law applies to the interpretation of all the policies except the Liberty Mutual policies, which are governed by New Jersey law. The law of both states holds that where the terms of an insurance contract are clear and unambiguous, they must be given their common and ordinary meaning. See *Canadian Radium & Uranium Corp. v. Indemnity Insurance Company of North America*, 411 Ill. 325, 104 N.E.2d 250 (1952); *Boswell v. Travelers Indemnity Co.*, 38 N.J.Super. 599, 120 A.2d 250 (1956); *Wilkinson & Son, Inc. v. Providence Washington Ins. Co.*, 124 N.J. Super. 466, 307 A.2d 639 (1973). In both states insurance contracts are to be liberally construed in favor of the insured and against the insurer. *J. L. Simmons Co. v. Fidelity and Casualty Co.*, 511 F.2d 87 (6th Cir. 1975) (applying Ill. law); *Last v. West American Co.*, 139 N.J.Super. 456, 354 A.2d 364 (N.J.1976). If there are ambiguities in the policy, or uncertainty over its interpretation, the policy is to be construed against the insurer, and in favor of the insured. *Tiffany Decorating Co. v. General Accounts Fire and Life*, 12 Ill.App.3d 597, 299 N.E.2d 378 (1973); *Bryan Construction Co. v. Employer's Surplus Lines Ins. Co.*, 60 N.J. 375, 290 A.2d 138 (N.J. 1972). See also *Corbett Co. v. Ins. Co. of North America*, 43 Ill.App.3d 624, 357 N.E.2d 125, 2 Ill. Dec. 148, 357 N.E.2d 125 (1976).

451 F.Supp. at 1237-38.

Appendix A

B.

Because of policy considerations and because of the medical testimony, we do not find controlling the analogous insurance cases urged upon us by the appellants.

First, there are the statute of limitations cases. In the past, defendants have argued that since a disease "occurs" at or shortly after exposure to a foreign substance, that is the time when the statute of limitations should start running. The problem is that such a ruling would bar relief to many plaintiffs who were unaware that they were being injured until years later when the disease manifests itself. To avoid such an unfair result, most courts [13] have adopted a manifestation rule:

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[13] *See United States v. Kubrick*, 444 U.S. 111, 123-24, 100 S.Ct. 352, 360-61, 62 L.Ed.2d 259 (1979); *Urie v. Thompson*, 337 U.S. 163, 170-71, 69 S.Ct. 1018, 1024-25, 93 L.Ed. 1282 (1949); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 570, 574-5 (3rd Cir. 1976); *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977); *Roman v. A. H. Robins Co.*, 518 F.2d 970, 972 (5th Cir. 1975); *Schenebeck v. Sterling Drug Inc.*, 423 F.2d 919, 924 (8th Cir. 1970); *R. J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776, 780 (5th Cir. 1963); *Brush Beryllium Co. v. Meckley*, 284 F.2d 797, 800 (6th Cir. 1960); *Sylvania Elec. Prods., Inc. v. Barker*, 228 F.2d 847-8 (1st Cir. 1955), *cert. denied*, 350 U.S. 988, 76 S.Ct. 475, 100 L.Ed. 854 (1956); *Thrift v. Tenneco Chems., Inc.*, 381 F.Supp. 543, 546 (N.D.Tex. 1974); *Withers v. Sterling Drug, Inc.*, 319 F.Supp. 878, 881 (S.D. Ind. 1970); *Steiner v. Ciba-Geigy Corp.*, 364 So.2d 47, 48-49 (Fla. Dist.Ct.App. 1978); *Chrischilles v. Griswold*, 260 Iowa 453, 463, 150 N.W.2d 94, 199 (1967); *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 175-76, 371 A.2d 170, 177 (1977); *Frohs v. Greene*, 253 Or. 1, 2-4, 452 P.2d 564, 565 (1969); *Gilbert v. Jones*, 523 S.W.2d 211, 213 (Tenn.Ct.App. 1974).

Indeed, asbestosis cases themselves are a prime example of the application of the "discovery rule" applied in statute of limitations cases. *See Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 160-61 (8th Cir. 1975); *Borel, supra*, 493 F.2d at 1102; *Velesquez v. Fibreboard Paper Prods. Corp.*, 97 Cal.App.3d, 881, 889, 159 Cal.

"inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently, the afflicted employee can be held to be "injured" only when the accumulated efforts of the deleterious substance manifest themselves". *Urie v. Thompson*, 337 U.S. 163, 170, 69 S.Ct. 1018, 1024, 93 L.Ed. 1282 (1949) (citation omitted)

Here, we find that the policy considerations are the opposite of those present in the statute of limitations cases. A manifestation rule would deny coverage to the insured manufacturer. Moreover, it is the injury and not its discovery that makes the manufacturer liable in the underlying tort suit. As noted above, such underlying liability should also trigger insurance coverage. We disagree with appellant's argument that identical language used in statutes of limitations and insurance policies must necessarily be interpreted identically. Linguistic uniformity should not dictate how contracts or statutes are interpreted. Statutes of limitation are meant to protect defendants against stale claims, nor bar injured plaintiffs who have acted in good faith. Insurance contracts are meant to cover the insured.[14]

Second, there are the worker's compensation cases. Assume that a worker is debilitated by a progressive disease

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Rptr. 113, 118 (1979); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497 (1979); *Harig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 71, 394 A.2d. 299, 300 (1978).

We note, however, that a minority of cases have rejected this liberal view and strictly hold that the statute of limitations begins to run from the time of injury, even if undiscoveerd. *See Thornton v. Roosevelt Hospital*, 47 N.Y.2d 780, 417 N.Y.S. 920, 391 N.E.2d 1002 (1979).

[14] *See e. g. Tijsseling v. General Accident Fire & Life Assurance Corp.*, 55 Cal.App.3d 623, 127 Cal.Rptr. 681 (1976) (that the cause of action accrued at manifestation did not mean that damages for insurance coverage purposes had to be measured from that point as well).

like asbestosis. Where that worker has been exposed to asbestos while working for various employers over the years, which employer is liable for the worker's compensation coverage? Courts have generally adopted a "last employer pays" rule.[15] This rule, however, is the general rule applicable in worker's compensation cases.[16] The underlying rationale for the rule is "the overriding importance of efficient administration in this area." *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955). While such considerations are present here, they do not override the rules of contract interpretation we have already noted. Moreover, because all that is required to establish workers compensation liability is a work-related injury, administrative considerations are of greater significance in workers compensation cases than in liability insurance cases.

Third, and of most relevance, are health insurance cases. Under these cases, there is no coverage until a disease is diagnosable as such.[17] Thus, in *Metropolitan Life Ins. Co.*

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[15] *See, e. g. General Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208 (2d Cir. 1977); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955); *Grain Handling Co. v. Sweeny*, 102 F.2d 464 (2d. Cir.), *cert. denied*, 308 U.S. 570, 60 S.Ct. 83, 84 L.Ed. 478 (1939); *Sylvia's Case*, 313 Mass. 313, 47 N.E.2d 293 (1943); *Yurow v. Jersey Hat Corp.*, 131 N.J.L. 265, 36 A.2d 296 (1944), *aff'd* 132 N.J.L. 180, 39 A.2d 371 (1944).

[16] We note that Illinois has passed specific worker's compensation legislation to deal with asbestosis and silicosis cases. Under this legislation, the last employer where the worker was exposed to asbestosis is liable. Ch. 48 Ill.Rev.Stat., § 172.36(d) (1975). New Jersey Law is similar. *See Bucuk v. Zusi Brass Foundry*, 49 N.J. Super. 187, 139 A.2d 436 (1958).

[17] *See e.g. Royal Family Ins. Co. v. Grimes*, 42 Ala.App. 481, 168 So.2d 262 (1964); *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936); *Broccolo v. Horace Mann Mut. Cas.*

v. Reynolds, 48 Ariz. 205, 60 P.2d 1070 (1936), a court found coverage for insanity which manifested itself during the policy period even though it was caused by syphilis contracted before there was insurance coverage. Similarly, *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921) also found covereage where the insured underwent surgery for a condition which had a cause which predated the policy period.

These cases certainly appear to provide support for the manifestation theory. We do not, however, view them as controlling here. On the contrary, we think that they support the exposure theory. The reason is that the health insurance cases rely on the same rules of construction that we think are applicable here; insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly, a policy must be construed to favor the legitimate expectations of the parties.

In *Metropolitan Life Ins. Co., supra*, the court construed an insurance policy which provided coverage where the insured had become totally and permanently disabled, as the result of "bodily injury or disease occurring and originating after the issuance of said Policy . . ." In *Cohen*, the court construed a similar insurance policy which provided coverage for a disability resulting from "a disease which shall originate and begin after this policy shall have been in continuous force for 30 days."

Both cases reached the same result for the same reasons. Health insurance policies protect the insured in case of

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Co., 37 Ill.App.2d 493, 186 N.E.2d 89 (1962); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921); *Kissil v. Beneficial Nat. Life Ins. Co.*, 64 N.J. 555, 319 A.2d 67 (1974); *Rieser v. Metropolitan Life Ins. Co.*, 262 App.Div. 171, 28 N.Y.S.2d 283 (1st Dept. 1941), *aff'd* 289 N.Y. 561, 43 N.E.2d 534 (1942). *See generally Annot.*, 53 A.L.R.2d 686 (1957).

disabling sickness. This is why people buy such policies in the first place. It would be unfair to the insured—and contrary to his expectations when he bought the insurance—to allow a hidden condition to defeat the coverage which he bought.[18]

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[18] There is yet another line of cases relating to property insurance. Under these cases, latent defects in property which later cause damage do not trigger insurance coverage. *See Maples v. Aetna Casualty & Surety Co.*, 83 Cal.App.3d 641, 148 Cal.Rptr. 80 (1978); *Tijsseling v. Gen'l Accident Fire & Life Assur. Corp.*, 55 Cal.App.3d 623, 127 Cal.Rptr. 681 (1976); *Remmer v. Glens Falls Indemnity Co.*, 140 Cal.App.2d 84, 295 P.2d 19 (1956); *Oceanonics Inc. v. Petroleum Distrib. Co.*, 280 So.2d 874 (La.App. 1973), *aff'd*; 292 So.2d 190 (La. 1974); *Deodato v. Hartford Ins. Co.*, 143 N.J.Super. 396, 363 A.2d 361 (1976), *aff'd*, 154 N.J.Super. 263, 381 A.2d 354 (1977); Annot. 57 A.L.R.2d 1385 (1958), *contra Sylla v. United States Fidelity & Guaranty Co.*, 54 Cal.App.3d 895, 127 Cal.Aptr. 38 (1976). In these cases, insurance coverage did not begin until the defect showed itself. However, in each of these cases, no damage or injury *of any kind* took place until manifestation.

However, when courts are dealing with property damage situations where damages slowly accumulate, courts have generally applied the exposure theory. So long as there is tangible damage, even if minute, courts have allowed coverage from that time. *Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502 (2d Cir. 1976), *cert. denied*, 434 U.S. 819, 98 S.Ct. 59, 54 L.Ed.2d 75 (1971); *Union Carbide Corp. v. Travelers Indemnity Co.*, 399 F.Supp. 12 (W.D.Pa. 1975); *Gruol Constr. Co. v. Ins. Co. of N. America*, 11 Wash.App. 632, 524 P.2d 427 (1974). *But see United States Fidelity & Guar. Co. v. American Ins. Co.*, 169 Ind.App. 1, 345 N.E.2d 267.

It is true that the above cases stand for the general rule that general liability insurance policies protect against injury and not just against the occurrence of a negligent act where that act does not result in injury. However, as the district court noted below, "[t]he negligent acts alleged in the underlying lawsuits occurred when the products were sold without sufficient warning, not when the plaintiffs were exposed. The medical evidence in this case indicates clearly that injury to lung tissue occurs soon after exposure, not when the disease manifests itself." 451 F.Supp. at 1241.

In this case, we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts would try to construe the contract language to embrace the exposure theory.

C.

We do not rely on judicial fiat. Initially, we note that Forty-Eight strenuously argues that the policy language is ambiguous. It points out that the insurance industry is divided between the manifestation and exposure theories and that some insurance companies which initially accepted coverage under the exposure theory only belatedly changed their position. It further emphasizes that words such as "bodily injury" and "occurs" are inherently ambiguous.

We think that a better view is that the contractual terms in issue here, "bodily injury" and "occurrence" are inherently ambiguous as applied to the progressive disease context before us. A cumulative progressive disease does not fit the disease or accident situation which the policies typically cover. There is usually little dispute as to when an injury occurs when dealing with a common disease or accident. As can be seen, in this case there is considerable dispute as to when an injury from asbestosis should be deemed to occur. For this reason, we can apply the above-stated canons of construction and resolve doubts in favor of maximizing coverage.

Aside from this, however, we believe that the policy language itself is best construed along the lines of the exposure theory. We need only look at the definition of "bodily injury" in the policy. Bodily injury is defined as "bodily injury, sickness or disease . . ." It is tautological that bodily injury can be "bodily injury" and is not neces-

sarily just a "disease". The medical evidence is uncontroverted that "bodily injury" in the form of tissue damage takes place at or shortly after the initial inhalation of asbestos fibers. Thus, it requires only a straightforward interpretation of the policy language for us to adopt the exposure theory. Indeed, for insurance purposes, courts have long defined the term "bodily injury" to mean "any localized abnormal condition of the living body." *See* Appleman, Insurance Law and Practices § 355 (1965).

We do not find persuasive appellants' contention that "bodily injury" means "compensable bodily injury." The manufacturer here paid for protection from bodily injury resulting in liability. It should make no difference *when* the bodily injury happens to become compensable. Put another way, we see nothing in the policy which requires that the underlying plaintiffs' cause of action accrue within the policy period. There exists a clear distinction between when bodily injury occurs and when the bodily injury which has occurred becomes compensable.

Although the problem presented by this case is one of first impression for an appellate court, the parties were aware of the potential problems which cumulative tort cases might present throughout the contract period. The etiology of asbestosis has been known since at least the 1930's. Although *Borel* was not decided until 1973, it was certainly foreseeable that asbestos manufacturers might be held liable for failing to warn workers of the danger of asbestos. "But though the application is novel, the underlying principle is ancient. Under the law of torts, a person has long been liable for the foreseeable harm caused by his own negligence. This principle applies to the manufacture of products as it does to almost every other area of human endeavor." *Borel, supra* at 1103,

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The policies themselves show that the insurance industry contemplated the problem presented by cumulative trauma cases.[19] Since 1962, each of the policies in question has included in its definition of "occurrence" a provision referring to continuous or repeated exposure to conditions which result in injury.[20] There is strong evidence that coverage of diseases such as asbestosis was contemplated. Indeed, appellants openly admit that this is true. There is no similar provision in the policies restricting coverage to when asbestosis manifests itself. The insurance industry doubtless did not foresee the extent of the liability problem asbestosis cases would present. However, that in itself is no basis for construing the contract the way the appellants want.

In sum, we think that the exposure theory adopted by Chief District Judge John Feikens is the superior interpretation of the contract provisions.[21] "Bodily injury"

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[19] We additionally note that published interpretations of the standard clauses in the industry-wide comperhensive general liability policy recognized the possibility that a court would adopt a proration scheme. See R. Elliott, The New Comprehensive General Liability Policy 12-3 to 12-5 in Practicing Law Institute, Liability Insurance Disputes (Sol. Schreiber, ed. 1968) ("In some exposure types of cases involving cumulative injuries it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage occurring during its policy period."); W. Abrist, The New Comprehensive General Liability Insurance Policy: A Coverage Analysis (Defense Res. Inst., Inc. 1966) ("In some exposure types of cases involving cumulative injuries it is possible that more than one policy will afford coverage each to apply to bodily injury or property damage occurring during its policy period.")

This shows that there was at least a recognized posisbility that a court would adopt some form of proration scheme.

[20] *See* appendix A.

[21] Appellants' argument *in terrorem* is that a ruling in favor of the exposure theory will create vast liability for a host of latent

should be construed to include the tissue damage which takes place upon initial inhalation of asbestos. That is both a literal construction of the policy language and the construction which maximizes coverage. It is also the construction which, we think, best represents what the contracting parties intended.

The thrust of the appellants' arguments is that we should apply a uniform manifestation rule in all cases, including this one, and not be concerned with medical intricacies. We see no evidence that this is what the parties meant.

III.

Although victorious below, Forty-Eight urges that we modify the district court opinion in three respects. We shall discuss these questions *seriatim*.

A.

The district court, as discussed above, adopted the exposure theory for purposes of liability and prorated liability among all of the insurance companies which were on the risk while the injured victim was breathing in asbestos. For those years that Forty-Eight did not have insurance, the district court treated the manufacturer as self-insured and responsible for a pro rata share of the cost of indemnification. Thus, if insurer A provided 3 years of coverage, insurer B an additional 3 years, and the manu-

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diseases. The appellants point out that the insurance policies in question expired years ago. We here rule only concerning asbestosis, a disease which has been long-known. If a disease is unknown, we see no underlying basis for liability. The problems of liability under old insurance policies are no different here than in cases where a minor was injured and we did not sue wihle he was under a disability.

facturer was uninsured for the remaining 3 years, liability would be allocated at 1/3 for each of the three concerns.

The district court applied an identical rule apportioning the costs of defending the underlying suits. To the extent that the manufacturer was uninsured. It has to bear its pro-rata share of the losts of defense.

Forty-Eight agrees that it must bear its share of the liability risk for those years in which it had no insurance—that is, before October of 1955. However, Forty-Eight vehemently argues that the district court was wrong in prorating the cost of defending the law suits against it.

Forty-Eight argues that the insurer's obligation to defend is very broad—broader than its obligation to indemnify. Under the very wording of the insurance policies, the insurance companies had a duty to defend based on the allegations in the complaint, even if the allegations are groundless, false, or fraudulent . . ." *See Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976).

Forty-Eight argues further than the duty to defend is sufficiently broad so that it arises when one count of the complaint is within policy coverage and other counts are not. In many such cases, courts have not permitted apportionment of defense costs between the insurer and the insured.[22] From these cases, Forty-Eight argues that so long as any insurance company had a duty to defend, it (Forty-Eight) should not be liable for any costs of defense, even

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[22] *Tampa Elec. Co. v. Stone & Webster Corp.*, 367 F.Supp. 27 (M.D.Fla. 1973); *Hogan v. Midland Nat'l. Ins. Co.*, 3 Cal.3d 553, 91 Cal.Rptr. 153, 476 P.2d 825 (1970); *St. Paul Fire & Marine Ins. Co. v. Hodor*, 200 So.2d 205 (Fla.App. 1967); *Prince v. Universal Underwriters Ins. Co.*, 143 N.W.2d 708 (N.D. 1966); *Mannheimer Bros. v. Kansas Cas. & Sur. Co.*, 149 Minn. 482, 184 N.W. 189 (1921); *Home Ins. Co. v. Pinski Bros. Inc.*, 160 Mont. 219, 500 P.2d 945 (1972).

if part or most of the underlying lawsuit concerned periods of time when Forty-Eight was uninsured.

[2] We cannot agree. We fully accept the legal principles and cases on which Forty-Eight relies. What Forty-Eight ignores is the *rationale* on which its authorities are based. An insurer must bear the entire cost of defense when "there is no reasonable means of prorating the costs of defense between the covered and the not-covered items." *Nat'l. Steel Construction Co. v. Nat'l. Union Fire Ins. Co.*, 14 Wash.App. 573, 543 P.2d 642, 644 (1975). Thus, in the typical situation, suit will be brought as the result of a single accident, but only some of the damages sought will be covered under the insurance policy. In such cases, apportioning defense costs between the insured claim and the uninsured claim is very difficult. As a result, courts impose the full cost of defense on the insurer.[23]

These considerations do not apply where defense costs can be readily apportioned. The duty to defend arises solely under contract. An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period. Where the distinction can be readily made, the insured must pay its fair share for the defense of the non-covered risk.[24]

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[23] *See e.g. All Star Ins. Corp. v. Steel Bar, Inc.*, 324 F.Supp. 160, 163 (N.D.Ind. 1971); *Apex Mutual Ins. Co. v. Christner*, 99 Ill.App. 2d 153, 240 N.E.2d 742 (1968); *Marston v. Merchants Mutual Ins. Co.*, 319 A.2d 111, 114 (Me.1974); *Satterwhite v. Stolz*, 79 N.M. 320, 442 P.2d 810, 812 (1968); *Steel Erection Co. v. Travelers Indemnity Co.*, 392 S.W.2d 713, 715-6 (Tex.Civ.App. 1965); *Waite v. Aetna Casualty & Surety Co.*, 77 Wash.2d 850, 467 P.2d 847, 852-3 (1970).

[24] *See* cases cited at n.22.

[3] In this case Forty-Eight's own exposure theory, substantially adopted by the district court, establishes that a reasonable means of proration is available. Forty-Eight has urged that indemnity costs can be allocated by the number of years that a worker inhaled asbestos fibers. By embracing the exposure theory, we have agreed. There is no reason why this same theory should not apply to defense costs. The different insurance companies will pro-rate defense costs among themselves. It is reasonable to treat Forty-Eight as an insurer for those periods of time that it had no insurance coverage.[25] Were we to adopt Forty-Eight's position on defense costs a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20. Neither logic nor precedent support such a result.

B.

Forty-Eight also argues that liability for asbestos-caused injuries should not be permitted for any time period unless it can be shown that its products were involved. Although the district court used the term "joint and several liability", we read its decision as implicitly adopting this position.

[4] In an underlying asbestosis suit, the plaintiff must show that Forty-Eight's products injured him in order to

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[25] Forty-Eight raises the spectre of a conflict of interest between the insurers and Forty-Eight, since the insurance company would have an interest in minimizing the amount of exposure during its policy period and maximizing that of the manufacturer for those periods that the latter was self-insured. We cannot agree that this is a significant problem in light of an attorney's duty to protect the interest of the insured. *See e.g. Parsons v. Continental Nat'l. Am. Group*, 113 Ariz. 223, 550 P.2d 94 (1976).

be able a maintain a cause of action against Forty-Eight.[26] Under *Borel*, Forty-Eight would be jointly and severally liable along with the other asbestos manufacturers. 493 F.2d at 1094-96. However, in allocating the cost of indemnification under the exposure theory, only contract law is involved. Each insurer is liable for its pro rata share. The insurer's liability is not "joint and several", it is individual and proportionate. Accordingly, where an insurer can show that no exposure to asbestos manufactured by its insured took place during certain years, then that insurer cannot be liable for those years. The reason is simple: no bodily injury *resulting from Forty-Eight's products*, took place during the years in question. The same thing would be true if an insurer could show that a worker used an effective respirator during certain years. Again, no "bodily injury" would have taken place.

We think that this is implicit in the district court's opinion and only state it here for clarity. However, the burden of disclaiming coverage will be on the insurer for the year or years in question.[27]

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[26] As we note in n.3, *supra*, in some cases, courts have adopted a theory of industry-wide enterprise liability even absent proof that a given company's product or products caused injury. So far as we know, however, this broad theory has not been extended to asbestosis cases.

[27] We recognize that the general rule is that the burden of proof to show coverage is on the insured. *See e.g. Hayes v. Country Mutual Ins. Co.*, 28 Ill.2d 601, 192 N.E.2d 855, 858 (1963); *Warren v. Employers' Fire Ins. Co.*, 100 N.J.Super. 464, 242 A.2d 635, 639 (1968), *rev'd on other grounds*, 53 N.J. 308, 250 A.2d 578 (1969); 46 C.J.S., Insurance § 1316; 44 Am.Jur.2d Insurance § 1964.

In an asbestosis case, however, under *Borel*, all that an injured worker need do is prove that a given manufacturer's products contributed to the worker's asbestosis at any time. That is enough to trigger joint and several liability. As the briefs filed in this case forcefully remind us, few companies keep records more than 15 or

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C.

Finally, Forty-Eight urges that we modify the district court's proration formula. Forty-Eight argues that the formula should reflect not only the injury caused by asbestos during the policy years when the worker breathed in asbestos fibers, but also the injury which developed afterward. Thus, if three insurance companies were on the risk for a 9 year period of exposure, under Forty-Eight's formula the first insurer would be on the risk for the first 3 years *plus* the remaining 6 while the disease progressed. The second insurer would be on the risk for 3 years *plus* the following 3 years. The final insurer would be on the risk only for the final 3 years. Thus liability would be apportioned 9/18 for the first insurer, 6/18 for the second, and 3/18 for the third. Under the district court's formula, of course, each insurer would be liable for 1/3 of the costs.

We cannot accept this interesting formula because of the explicit language of the policies which define "occurrence" as "an accident, *including continuous or repeated exposure to conditions*". (emphasis added) Moreover, this proposed formula would place different obligations upon insurers

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20 years, if that long. Thus, in many if not most cases, it will be impossible to tell which company's products were used at what time. At best, there will be vague testimony that manufacturer X's products were used at a certain job site during certain years. Considering that much exposure took place during the 1930's and 1940's, vague testimony is the best evidence that can be unearthed in many cases.

Because of these unique circumstances, we think it appropriate to presumptively view *each* manufacturer as being on the risk for each of the years in which a worker was exposed to asbestosis. If an insurance company can show that a certain manufacturer's products were not or could not have been involved for certain years, it will be absolved from paying its prorata share for those years. Given the impossibility in most cases of ascertaining which company provided asbestos products in different years, we think that this

who are in the same position. The extent of the insurer's liability would turn on the accident of *when* an insurer provided coverage. We reject this anomalous result.

Conclusion

Because the insurance industry did not fully appreciate the extent of potential liability for asbestos-caused injuries, we have this impossible problem before us. There is no truly satisfactory solution we can make. Each theory has its flaws and anomalies.[28] Judge Feikens struggled with

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is the fairest way to apportion liability. Thus, we simply reverse the ordinary burden of proof and place it on the insurer. We are keenly aware of the need to apply a straightforward formula and not one which will lead to additional litigation.

[28] Appellants are correct that the exposure theory we adopt has problems with "stacking". From 1955 through 1977, Forty-Eight held twelve different insurance policies issued by five different companies. Eleven of these policies had aggregate limits of from $300,000 to $500,000 per occurrence. The twelfth policy had an aggregate limit of $1,000,000. The combined aggregate limits of the twelve policies is $5.6 mililon.

The problem is that if the inhalation of each asbestos fiber is deemed to be a separate "bodily injury", this results in the "stacking" of liability coverage to produce coverage that is many times $5.6 million. This amounts to giving Forty Eight much more insurance than it paid for. The district court recognized that problem which stacking presented. The court stated:

> In any event, no insurer should be held liable in any one case to indemnify Forty-Eight for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimant's exposure for which judgment was obtained. 451 F.Supp. at 1243.

We agree with the district court. The initial exposure to asbestos fibers in any given year triggers coverage. However, under the terms of the policies, additional exposure to asbestos fibers is treated as arising out of the same occurrence. Thus, on its face, the liability of each insurer is limited to maximum amount "per occurrence" provided by each policy. We have no problem with the district court's

this case, as we have, and thought that the exposure theory was preferable. Although his opinion has been challenged by virtually every party and amicus on one ground or another, we think that he reached the right result for the right reasons.[29]

The judgment of the district court is affirmed.

APPENDIX A

Policy Name and Number	From	To	One Person One Accident	One Person More Than One Accident	Aggregate
Ins. Co. of North Amrica					
9LB21567	10/31/55	10/31/58	100,000	300,000	300,000
9LB24403	10/31/58	10/31/61	100,000	300,000	300,000
LB24688	10/31/61	6/17/62	100,000	300,000	300,000
LB21688 (End)	6/18/62	10/31/64	500,000	500,000	500,000
LB24913	10/31/64	10/31/67	500,000	500,000	500,000
ALB25120	10/31/67	10/31/72	500,000	500,000	500,000
Affiliated FM Insurance Co.					
GLA71255	10/31/72	1/22/73	500,000	500,000	500,000
GLA72342	1/22/73	12/31/73	500,000	500,000	500,000
GLA71886	12/31/73	1/10/75	400,000	400,000	400,000
Illinois National Insurance Co.					
GLA953273	1/10/75	1/12/76	300,000	300,000	300,000
The Travelers Indemnity Co. of Rhode Island					
650-862A376-4-TRI-76	1/12/76	11/08/76	500,000	500,000	500,000
Liberty Mutual Insurance Co.					
LGI-632-004010-126	11/08/76	1/01/78	1,000,000	1,000,000	1,000,000

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extending the policy language so that each insurer would face no more liability per claim than the maximum limit it wrote during any applicable year of coverage.

[29] Appellant Liberty Mutual warns us in its brief that the district court's opinion, "if not corercted, will plague the nation's trial courts and appellate courts, together with insurers and insureds alike, for many years to come." We think that the "plague" will come regardless of how we decide this case. The cause of the plague, however, is an insurance industry which adopted a standard policy which is inadequate to deal with the problems of asbestosis.

APPENDIX B

Insurer	Policy Period	Insuring Agrement	Policy Period/ Territory	Relation to Other Insurance	Definitions
INA	10/31/55-10/31/58	To pay on behalf of insured . . . for damages because of bodily injury . . . caused by accident	This policy applies only to such injuries and damages occurring during the policy period . . .	Excess over other valid and collectible insurance	Bodily injury . . . shall be construed to include sickness, disease . . .
INA	10/31/58-10/31/61	Same	Same	Same	Same
INA	10/31/61-6/18/62	Same		Same	Same
INA	6/18/62-10/31/64 (endorsement)	To pay on behalf of insured . . . for damages because of bodily injury . . . caused by occurrence	Same	Same	Bodily injury . . . shall be construed to include sickness, disease . . . Ocurrence means either an accident happening during the policy period or a continuous or repeated exposure which . . . causes injury during the policy period
INA	10/31/64-10/31/67	To pay on behalf of insured . . . as damages because of bodily injury	This policy aplies only to occurrences which take place during the policy period	Excess over other collectible insurance with any other insurer	Bodily injury means bodily injury, sickness, disease . . . As respects property damage liability, occurrence means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to or destruction of property during the policy period

APPENDIX B—*Continued*

Insurer	Policy Period	Insuring Agreement	Policy Period/ Territory	Relation to Other Insurance	Definitions
INA	10/31/67-10/31/70 (renewal through 10/31/72)	To pay on behalf of insured . . . as damages because of bodily injury . . . caused by an occurrence	This policy applies only to bodily injury . . . which occurs during the policy period	Primary; contains formula where other insurance applies on same basis . . .	Bodily injury means bodily injury, sickness or disease . . . As respects property damage liability occurrence means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of the insured.
Affiliated	10/31/72-1/22/73	Will pay on liability of insured . . . as damages because of bodily injury . . . caused by an occurrence	This policy applies only to bodily injury . . . which occurs during the policy period . . .	Same	Bodily injury means bodily injury, sickness or disease . . . Occurrence means an accident, including injurious exposure to conditions, which results during the policy period in bodily injury neither expected nor intended from the standpoint of the insured
Affiliated	1/23/73-12/31/73	Will pay on behalf of the insured . . . as damages because of bodily injury . . . caused by an occurrence	This policy applies only to bodily injury . . . which occurs within the policy territory	Same	Bodily injury means bodily injury, sickness or disease, which occurs during the policy period . . . Occurrence means an accident, including continuous or repeated exposure to conditions which results in bodily injury . . .

APPENDIX B—*Concluded*

Insurer	Policy Period	Insuring Agreement	Policy Period/ Territory	Relation to Other Insurance	Definitions
Affiliated	12/31/73- 1/10/75	Will pay on behalf of the insured . . . as damages because of bodily injury caused by an occurrence	This policy applies only to bodily injury . . . which occurs within the policy territory	Same	Bodily injury means bodily injury, sickness or disease . . . which occurs during the policy period . . . Occurrence means an accident, including continuous or repeated exposure to conditions which results in bodily injury . . .
Illinois	1 /75- 1, 2/76	Same	Same	Same	Definition of bodily injury same as above Definition of occurrence same as above
Travelers	1/12/76- 11/ 8/76	Same	This policy applies during the policy period as described in such sections	Same	Definition of bodily injury same as above Definition of occurrence same as above
Liberty Mutual	11/ 8/76-	Same	This policy applied only to bodily injury . . . which occurs within the policy territory	Same	Definition of bodily injury same as above Definition of occurrence same as above

Appendix A

MERRITT, Circuit Judge, dissenting.

As the Court states in its thoughtful opinion, this is an unusual case with far-reaching effects on injured workers, the insurance industry and asbestos manufacturers. The case presents an issue that probably deserves legislative consideration and resolution.

Asbestosis is a disease that progresses through three stages: the "exposure" stage, the "discoverability" stage, and the "manifestation" stage. It begins with exposure to asbestos fibers and remains latent or undiscoverable in the first stage; later it reveals itself as a network of scars on the lung tissue discoverable by X-ray; and then in the advanced stage of the disease it becomes "manifest" to the victim and diagnosable through physical symptoms such as shortness of breath, fatigue, clubbing of the fingers, or secretion of mucoid sputum. The question is: When does the coverage of a liability insurance carrier begin for the disease of asbestosis?

There is a better solution to the problem than either of the extremes proposed by the litigants, *i.e.*, the "manifestation" theory and the "exposure" theory. Our Court, and also District Judge Feikens in a comprehensive opinion, reported at 451 F.Supp. 1230 (E.D.Mich. 1978) have adopted the exposure theory. In my view, a carrier's coverage should begin with the second or discoverability stage.

A. THE "EXPOSURE" RULE

The exposure theory, although appealing on first reading, is at odds with insurance and tort law and fairness. This rule is not satisfactory because some asbestos may be safely inhaled without the disease ever developing. With more exposure, some harm may later devlop but remain latent for a significant number of years. Insurance law does not

impose liability or coverage until some identifiable harm arises. An indemnifiable act does not occur at the time of the negligent act, but at the time the legally recognizable harm appears. Thus if a worker were tortiously exposed to asbestos and no "bodily injury, sickness or disease" arose for x number of years, then the only insurers liable are those whose policies were in effect x years after exposure. *See Mann v. Mann*, 133 Ill.App.2d 552, 273 N.E.2d 40 (1971); *Great American Ins. Co. v. Tinley Park Recreation Com.*, 124 Ill.App.2d 19, 259 N.E.2d 867 (1970); *Muller Fuel Oil Co. v. Insurance Co. of North America*, 95 N.J. Super. 564, 232 A.2d 168 (1967); *see generally* Annot., 57 A.L.R.2d 1385, 1389; *Remmer v. Glens Falls Indemnity Co.*, 140 Cal.App.2d 84, 295 P.2d 19 (1956) (where land negligently graded and mudslide occurred 5 years after grading, insured event is at time of slide, not time of negligent grading).

The words "bodily injury, disease or sickness" are not specifically defined in the policies. Accordingly, they should be given their normal common law or traditional insurance law meaning. At the time of initial exposure, a victim could not successfully bring an action against the manufacturer because at that time he has suffered no compensable harm. Assuming harm may eventually arise in the future, the common law generally views future damage as too speculative until the victim can at least prove a probability of harm. *See, e.g., Jeffrey v. Chicago Transit Authority*, 37 Ill.App.2d 327, 185 N.E.2d 384 (1962); *see generally* W. Prosser, Handbook of The Law of Torts § 30, at 143 (4th ed. 1971).

A similar principle guides both property insurance cases (see cases cited in the preceding paragraphs) and health insurance cases. *See, e.g., Broccoio v. Horace Mann Mut. Cas. Co.*, 37 Ill.App.2d 493, 186 N.E.2d 89 (1962); *Craig*

v. Central Nat. Life Ins. Co., 16 Ill.App.2d 344, 148 N.E. 2d 31 (1958); *Kissil v. Beneficial Nat. Life Ins. Co.*, 64 N.J. 555, 319 A.2d 67 (1974); *see generally Annot.*, 53 A.L.R.2d 686, 688-89 (1957) (no disease unless diagnosable with reasonable medical certainty). In both lines of cases, latent conditions that are not discoverable with a reasonable certainty do not amount to an event or condition that triggers indemnification liability. In this case to detect the scarring caused by any one of an initial batch of inhaled fibers might require many random samplings of tissue from numerous different parts of the lung. Obviously this is neither a practical nor reliable process.

B. THE "MANIFESTATION" RULE

The insurance companies other than Travelers argue that we should adopt the manifestation rule. This rule would impute liability to the insurer only when the disease actually "manifests" itself through physical symptoms such as shortness of breath or through other symptoms that are actually medically diagnosed as indicia of asbestosis.

There are several difficulties with this rule. Such a rule construes the ambiguities of the words "disease" and "occurrence" most favorably to the insurer rather than the insured. In addition, the rule would most likely result in no coverage at all in the future. Insurance companies know which particular manufacturers over the years have generated a large risk pool of victims whose disease may become manifest. Carriers, knowing that they would otherwise have to pay the full unprorated amount of a number of asbestosis claims, would most likely refuse to insure such manufacturers.

In addition, the medical evidence indicates that asbestosis is a harmful, discoverable disease before it reaches the

advanced or "manifestation" stage. The health insurance cases hold that a disease may exist if it is diagnosable with reasonable medical certainty. They do not require that the disease must be diagnosed as such in order to determine the beginning date of coverage.

C. THE "DISCOVERABILITY" RULE

Asbestosis is a discoverable disease long before it reaches the advanced stage of manifestation. We should adopt the discoverability rule. This rule is more consistent with the medical evidence and the case law since it is tied statistically to the development of a diagnosable disease. X-ray evidence, although sometimes only a harbinger of outward disability, is legally sufficient to constitute "disease" under the health insurance cases.

The health insurance cases turn on the concept of latency. A condition which is not latent is a disease, and latency is defined in terms of being discoverable with reasonable medical certainty. Thus the initial microscopic scarring, observable solely by taking a lung biopsy (*i.e.*, cutting into the lung itself), is a latent condition because of the unreliable and extraordinary measures necessary for medical detection. But X-rays are a relatively reliable, commonplace means of medical diagnosis. Once asbestosis is detectable by X-ray it is therefore not latent.

It would be reasonable for the insured to expect that once X-ray pathology becomes evident the "disease" "occurs" (given the ambiguity of these words) under the insurance contract at that time. *See* Keaton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv.L.Rev. 961, 973 (1970) ("[T]he principle of honoring reasonable expectations, though only occasionally recognized explicitly, is a better explanation of results in many cases than a strained rationale such as that . . . of resolving ambiguities

against the insurer.") Under the common law notion of harm, moreover, the possibility of impending manifestation, if not already a reality, is far less speculative at the time of X-ray diagnosis than at initial exposure. One expert testified that once X-ray pathology becomes evident, the condition tends to worsen without further exposure.

In order to make the discoverability rule judicially and administratively manageable, I must draw a somewhat arbitrary line. The typical victim will not bring suit against a manufacturer until the disease has manifested itself. At this point it will be impractical if not medically impossible for anyone to determine retrospectively when asbestosis was first "discoverable" by X-ray. Yet an insured does not expect his claim to be defeated because of the difficulty of ascertaining the precise date the disease became discoverable.

Although it is not entirely satisfactory, I can find no better rule than a rule that the "disease" of asbestosis "occurs" ten years from the date of first exposure. Every further exposure will be an additional compensable injury. Liability would thus be prorated by length of policy term among all insurers whose policies were (1) in force ten years beyond initial exposure to any manufacturer's product and (2) also in force during a specific interval in which the victim was exposed to a product of Forty-Eight. In the unlikely event that asbestosis manifests itself before the tenth anniversary of initial exposure, the insurer whose policy is in effect at manifestation would be liable.

This ten year rule relieves the insurance companies from liability for periods during which the disease is in its latent stage. The rule prevents insurance companies from defeating coverage entirely or from shifting losses to another when they know, as a matter of statistical probability, that great numbers of victims have diagnosable asbestosis

and are on the verge of manifesting the disease and filing a claim.[1]

The ten year rule represents a compromise. I believe, however, that this compromise is supported by the medical evidence. On deposition, Dr. George Wright testified

> [T]here are some bits of information about the [X-ray detection] in some settings where the exposures have been to our knowledge quite heavy. People begin to show X-ray abnormalities about seven to eight years after the onset of this experience of being exposed. Now, mind you, they are exposed all during that time, but turn that around, it says people can be heavily exposed to asbestos and give no over evidences of it for seven, eight, or ten years. . . . [I] you saw it for the first time in 1977 for the simple reason that nobody looked back before that time, it might have been there since, oh, 1965, ten years after the beginning of exposure.

According to the deposition of Dr. Henry Anderson:

> [U]nder certain circumstances you can see X-rays [sic] changes within five years. . . .
>
> In our studies of insulation workers, roughly one thousand chest x-rays taken, individuals with less than ten years from the onset of their first exposure, ten percent of them had abnormal x-rays. Those with forty years from onset, roughly 90 percent had abnormal x-rays. . . .
>
> Given a man's exposure, somebody with twenty years, probably you can say it may well have started to have changes after ten that would perhaps be detectable.

Because the ten year average may be predicated on "heavy exposure," I could have selected a greater number.

---

[1] There is nothing unusual or outside the common law tradition about such a 10-year rule. The common law has many times had to draw similar arbitrary lines. The 21-year rule developed by the common law in adverse possession cases and the equitable doctrine of laches are two examples. Many others could be cited.

Presumably lighter periodic exposure would result in a lengthier latency period. But the medical evidence in the record supports no better compromise. I must choose some number, and I am inclined to choose one that serves to promote coverage.

A rule that is occasionally overinclusive provides compensating public benefits that an underinclusive rule lacks. It better spreads losses that the parties claim were unforeseen by the industry as a whole. As a rule of construction it also tends to reduce the costs of future accidents by placing the burden of liability on insurers best able to evaluate the risks of hazardous activity and best able to deter or minimize the ultimate tort costs of that activity. *See generally* G. Calabresi, *The Cost of Accidents* (1971) (accident costs minimized by placing ultimate liability on "least cost avoider"). The more "early" insurers that are liable upon a victim's exposure, the more likely it is that the potential harm will be discovered and the public warned. If an insurer sees that the product poses some risks, he may raise premiums accordingly. This may ultimately cause the manufacturer to remove the product from the market or to give better warnings in order to lower insurance premiums. This in turn reduces accident costs. On the other hand, imposing liability on only "later" insurers provides less incentive for early insurers to police the insured. The insured might be lulled into irresponsibility because he will not be assessed the present costs of future harm.

Accordingly, I would reverse the judgment below and adopt the "discoverability" rule outlined above.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INSURANCE CO. OF NORTH AMERICA,
Plaintiff-Appellant

v.

FORTY-EIGHT INSULATIONS, INC.,
Defendant-Appellee
Cross-Appellant,

and

AFFILIATED FM INSURANCE CO.,
ILLINOIS NATIONAL INSURANCE CO.,
LIBERTY MUTUAL INSURANCE CO.,
Defendants-Appellants,

and

TRAVELERS INDEMNITY OF RHODE ISLAND,
Defendant-Appellee

Before: KEITH and MERRITT, Circuit Judges, and PECK, Senior Circuit Judge.

Less than a majority of the active judges of this court having voted in favor of rehearing en banc, the parties' cross-petitions for rehearing have been referred to the panel for consideration. We grant, in part, the petitions for rehearing.

I.

All of the parties have requested that we clarify our opinion regarding its application to mesothelioma and broncheogenic carcinoma. As we indicated in footnote one of our opinion, we pretermitted a discussion of mesothelioma and broncheogenic carcinoma and focused on the

disease of asbestosis. The reason for this was that the medical evidence in the record suggested that these diseases were different from asbestosis.

Mesothelioma and broncheogenic carcinoma (lung cancer) were dealt with only obliquely in the record, in the district court opinion and in the briefs on appeal. However, the parties are correct that the issue is before us on appeal and that our opinion needs clarification on this point.

We conclude that mesothelioma and lung cancer should be treated the same as asbestosis. We reach this conclusion for two reasons. First, the brief discussion in the record about these diseases supports this result. Dr. George Wright testified that recent research tends to show that the development of mesothelioma and lung cancer is linked to inhalation of asbestos and that the development of these diseases is dose-related. In other words, the greater the exposure to asbestos the greater the probability that lung cancer and mesothelioma will develop. It is true that not all persons who breathed in asbestos fibers contract lung cancer and/or mesothelioma. However, as in asbestosis, those persons who contract mesothelioma and lung cancer will have breathed in numerous asbestos fibers over the years.

Second, we rely on policy grounds. As Liberty Mutual's Petition for Rehearing reminds us, many of the underlying plaintiffs' complaints against the manufacturers allege both cancer and asbestosis. To treat cancer and asbestosis differently would needlessly complicate settlement and defense of the individual lawsuits. We see no reason to create more difficulties for the parties than already exist in this complicated case.

Accordingly, we order that the following language be inserted at the end of footnote one of our opinion:

Nonetheless, we conclude that mesothelioma and lung cancer should be treated the same as asbestosis. We reach this conclusion for two reasons. First, the brief discussion in the record about these diseases supports this result. Dr. George Wright testified that recent research tends to show that the development of mesothelioma and lung cancer is linked to inhalation of asbestos and that the development of these diseases is dose-related. In other words, the greater the exposure to asbestos the greater the probability that lung cancer and mesothelioma will develop. It is true that not all persons who breathed in asbestos fibers contract lung cancer and/or mesothelioma. However, as in asbestosis, those persons who contract mesothelioma and lung cancer will have breathed in numerous asbestos fibers over the years.

Second, we rely on policy grounds. Many of the underlying plaintiff's complaints against the manufacturers allege both cancer and asbestosis. To treat cancer and asbestosis differently would needlessly complicate settlement and defense of the individual lawsuits. We see no reason to create more difficulties for the parteis than already exist in this complicated case.

II.

Those companies advancing the manifestation theory have presented no arguments to us that we did not carefully consider beforehand. We continue to believe that both the plain meaning rule of construction and the rule requiring construction of a policy in favor of the insured support the exposure theory. The companies are correct that not all workers exposde to asbestos fibers contract an asbestos related disease. However, for the worker who does contract asbestosis, the bodily injury first occurred when the worker first started breathing asbestos fibers.

Appendix B

III.

Forty-Eight, while generally content with our decision, has urged us to reconsider our decision to allocate defense costs the same as liability costs. Forty-Eight claims that we have given an unduly narrow construction to the insurance companies' duty to defend.[1]

We adhere to our original position. The exposure theory provides a fair method of allocating insurance coverage. This same method can be readily applied to allocating defense costs as well as liability costs. Where costs can be readily apportioned, as here, it is reasonable to have Forty-Eight pay its fair share of defense costs as well as indemnification costs.

Accordingly, the Petitions for Rehearing are granted in part, as outlined above, and otherwise denied. Judge Merritt adheres to the position outlined in his dissenting opinion.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

[1] In its Petition for Rehearing, Forty-Eight cites as an example the situation where it is initially believed that Forty-Eight's products injured a worker in a year in which Forty-Eight had insurance coverage. If it turns out that Forty-Eight's products injured a worker in a non-covered year, Forty-Eight claims that it will have to pay the full cost of defending the suit. This ignores the presumption outlined in footnote 21 or our opinion under which continued exposure to Forty-Eight's products is presumed for insurance coverage purposes. Forty-Eight will only have to pay full defense indemnity costs if there is strong evidence that exposure to Forty-Eight's products *only* took place in years when Forty-Eight had no insurance coverage.

APPENDIX C

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff,

v.

FORTY-EIGHT INSULATIONS, INC.,

Affiliated FM Insurance Company, Illinois National Insurance Company, Travelers Indemnity of Rhode Island and Liberty Mutual Insurance Company, Defendants.

Civ. A. No. 7-71654.

United States District Court,
E. D. Michigan, S. D.

May 4, 1978.

OPINION

FEIKENS, District Judge.

A declaratory judgment is sought by the Insurance Company of North America (INA) against its former insured, Forty-Eight Insulations, Inc. (Forty-Eight), and four (4) other insurance carriers who at some time insured Forty-Eight. These four companies are Affiliated FM Insurance Company (Affiliated FM), Illinois National Insurance Company (Illinois National), The Travelers Indemnity Company of Rhode Island (Travelers), and Liberty Mutual Insurance Company (Liberty Mutual).

This court has jurisdiction of this case by reason of diversity of citizenship of the parties and venue is proper in this district.

The dispute raises questions as to which insurance carrier has a duty to defend and/or to indemnify Forty-Eight for any resultant judgments against it in numerous pending underlying lawsuits. An ancillary issue is whether or

not Forty-Eight must share in the payment of a judgment or in the costs of defense. The plaintiffs in each of those lawsuits, either for themselves or as representatives of decedents, claim to have suffered injury or death from asbestos-caused lung diseases as a result of being exposed to Forty-Eight's products containing asbestos. As of the date of this opinion 251 underlying lawsuits have been filed throughout the United States naming Forty-Eight as a defendant. All these suits also name additional defendants—in some cases as many as twenty (20).

In a typical underlying lawsuit a plaintiff construction worker, employed for many years installing products containing asbestos, sues all of the manufacturers whose asbestos products were used at any of the construction sites at which he was employed. The amount of asbestos dust from each manufacturer's product to which such worker was allegedly exposed or what amount he inhaled during any period of exposure cannot be determined with certainty. The exposures allegedly range in duration from a few years to as long as 48 years.

Under the law of some jurisdictions in which these underlying suits are filed all of the manufacturers may be held jointly and severally liable for an entire damage award. *See, Borel v. Fibreboard Paper Products*, 493 F.2d 1076 (5th Cir. 1973); Prosser, *Law of Torts*, § 52 at 315-320 (4th Ed. 1971). In other jurisdictions the defendant manufacturers may have the burden of showing the proper apportionment of damages. *Id.* In all cases there is the potentiality that any or all of the defendant manufacturers may be held liable for damages.

The dispute between the parties in this case results from their disagreements over the interpretation of the various insurance policies issued to Forty-Eight and concern their respective rights and obligations regarding coverage and

the duty to defend. During the past 50 years Forty-Eight has had at least five (5) liability insurance carriers.[1] The controversy as to coverage is whether the coverage at the time of exposure to asbestos or the coverage at the time the disease manifests itself is the relevant coverage. Plaintiff INA and three of the defendant insurance carriers argue for the application of a "manifestation theory" while Forty-Eight and Travelers advocate an "exposure theory." [2]

I.

The parties have stipulated to most of the facts. In 1934 Forty-Eight, as a subsidiary of an Illinois corporation incorporated in 1923, began selling products containing asbestos. From 1923 through 1970 Forty-Eight or its predecessor manufactured and sold various types of insulation blocks and cements containing asbestos for use on boilers, pipes, fittings, elbows, and flat surfaces. In 1970 it discontinued the use of asbestos in all its products. This fact does not necessarily end the possibility of its asbestos product liability, however, in that demolition or removal of structures containing old insulating materials may cause asbestos to become airborne and may cause injury to persons employed in such activity. Given the latent periods of asbestos-caused lung disease, it is also anticipated that

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[1] Forty-Eight had additional insurers, but its records of coverage prior to 1955 have been destroyed. For the purposes of this declaratory judgment action it will be considered self-insured prior to that date.

[2] The parties entered into an agreement, supplemented by a stipulation in open court between Liberty Mutual and Forty-Eight to provide a defense for Forty-Eight and to handle the underlying lawsuits during the pendency of this declaratory judgment action, without prejudice to the rights of any party thereto to assert any claim or defense.

additional actions will be brought against Forty-Egiht alleging injury from past exposure.

A. INSURANCE COVERAGE

INA insured Forty-Eight in various policies from October 31, 1955 through October 31, 1972; Affiliated FM from October 31, 1972 through January 10, 1975; Illinois National from January 10, 1975 through January 12, 1976; and Travelers from January 12, 1976 through November 8, 1976. Liberty Mutual became an insurer of Forty-Eight on November 8, 1976 on a $100,000.00 deductible policy currently in force. The following chart shows the dates and coverage limits of the individual policies.

Policy Name and Number	From	To	One Person One Accident	More Than One Person One Accident	Aggregate
Ins. Co. of North America					
9LB21567	10/31/55	10/31/58	100,000	300,000	300,000
9LB24403	10/31/58	10/31/61	100,000	300,000	300,000
LB24688	10/31/61	6/17/62	100,000	300,000	300,000
LB24688 (End)	6/18/62	10/31/64	500,000	500,000	500,000
LB24913	10/31/64	10/31/67	500,000	500,000	500,000
ALB25120	10/31/67	10/31/72	500,000	500,000	500,000
Affiliated FM Insurance Co.					
GLA71255	10/31/72	1/22/73	500,000	500,000	500,000
GLA71342	1/22/73	12/31/73	500,000	500,000	500,000
GLA71886	12/31/73	1/10/75	400,000	400,000	400,000
Illinois National Insurance Co.					
GLA953273	1/10/75	1/12/76	300,000	300,000	300,000
The Travelers Indemnity Co. of Rhode Island					
650-862A376-4-TRI-76	1/12/76	11/8/76	500,000	500,000	500,000
Liberty Mutual Insurance Co.					
LGI-632-004010-126	11/08/76	1/01/78	1,000,000	1,000,000	1,000,000

The relevant policy provisions are those that define what is covered, when the coverage applies, and the definitions of the various terms used. These provisions are summarized as follows:

Appendix C

Insurer	Policy Period	Insuring Agreement	Policy Period/ Territory	Relation to Other Insurance	Definitions
INA	10/31/55-10/31/58	To pay on behalf of insured . . . for damages because of bodily injury . . . caused by accident	This policy applies only to such injuries and damages occurring during the policy period . . .	Excess over other valid and collectible insurance	Bodily injury . . . shall be construed to include sickness, disease . . .
INA	10/31/58-10/31/61	Same	Same	Same	Same
INA	10/31/61- 6/18/62	Same		Same	Same
INA	6/18/62.10/31/64 (endorsement)	To pay on behalf of insured . . . for damages because of bodily injury . . . caused by occurrence	Same	Same	Bodily injury . . . shall be construed to include sickness, disease . . . Occurrance means either an accident happening during the policy period or a continuous or repeated exposure which . . . causes injury during the policy period
INA	10/31/64-10/31/67	To pay on behalf of insured . . . as damages because of bodily injury	This policy applies only to occurrences which take place during the policy period	Excess over other collectible insurance with any other insurer	Bodily injury means bodily injury, sickness, disease . . . As respects property damage liability, occurrence means either an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally

Appendix C

Insurer	Policy Period	Insuring Agreement	Policy Period/ Territory	Relation to Other Insurance	Definitions
					causes injury to or destruction of property during the policy period
INA	10/31/67-10/31/70 (renewal through 10/31/72)	To pay on behalf of insured . . . as damages because of bodily injury . . . caused by an occurrence	This policy applies only to bodily injury . . . which occurs during the policy period	Primary; contains formula where other insurance applies on same basis . . .	Bodily injury means bodily injury, sickness or disease . . . As respects property damage liability occurrence means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of the insured
Affiliated	10/31/72- 1/22/73	Will pay on liability of insured . . . as damages because of bodily injury . . . caused by an occurrence	This policy applies only to bodily injury . . . which occurs during the policy period . . .	Same	Bodily injury means bodily injury, sickness or disease . . . Occurrence means an accident, including injurious exposure to conditions, which results during the policy period in bodily injury neither expected nor intended from the standpoint of the insured

Appendix C

Insurer	Policy Period	Insuring Agreement	Policy Period/ Territory	Relation to Other Insurance	Definitions
Affiliated	1/23/73-12/31/73	Will pay on behalf of the insured . . . as damages because of bodily injury . . . caused by an occurrence	This policy applies only to bodily injury . . . which occurs within the policy territory	Same	Bodily injury means bodily injury, sickness or disease, which occurs during the policy period . . . Occurrence means an accident, including continuous or repeated exposure to conditions which results in bodily injury . . .
Affiliated	12/31/73- 1/10/75	Will pay on behalf of the insured . . . as damages because of bodily injury . . . caused by an occurrence	This policy applies only to bodily injury . . . which occurs within the policy territory	Same	Definition of bodily injury same as above Definition of occurrence same as above
Illinois	1/10/75- 1/12/76	Same	Same	Same	Definition of bodily injury same as above Definition of occurrence same as above
Travelers	1/12/76-11/ 8/76	Same	This policy applies during the policy period as described in such sections	Same	Definition of bodily injury same as above Definition of occurrence same as above
Liberty Mutual	11/ 8/76-	Same	This policy applies only to bodily injury . . . which occurs within the policy territory	Same	Definition of bodily injury same as above Definition of occurrence same as above

Appendix C

On June 27, 1977, INA advised Forty-Eight that INA disclaimed any duty to defend or indemnify Forty-Eight under its various policies issued to Forty-Eight with respect to any lawsuits alleging asbestos-caused injury or death, as well as to any such lawsuits filed after June 27, 1977 in which a complaint alleged that the disease manifested itself after October 31, 1972, the date INA's final policy expired. Suit was thereupon filed by INA in the Northern District of Ohio and in this district. The Ohio action was adjourned pending the outcome of this declaratory judgment action. Forty-Eight has counterclaimed for declaratory judgment.

B. MEDICAL EVIDENCE

The medical testimony of Dr. Forde A. McIver introduced at trial and the depositions of Dr. Henry Anderson and Dr. George Wright admitted into evidence deal with asbestos-caused lung diseases in detail and are in substantial agreement on all points that are relevant to the issues. Asbestos-caused lung diseases alleged in the underlying complaints and described as asbestosis, mesothelioma or bronchogenic carcinoma (also known as lung cancer) can be divided into malignant and non-malignant varieties.

Asbestosis is a non-malignant disease resulting from the inhalation of asbestos fibers of a certain length over a considerable period of time causing a bodily reaction that may eventually impair the function of the lungs. The body has several defense mechanisms that exclude from the functional areas of the lungs most of the foreign matter inhaled. It also has a mechanism for removing such matter that passes these defenses. Asbestos fibers of a certain length, however, cannot be removed and become embedded in the lung tissue in the areas where the alveoli are found and where the transfer of gases in and out of the blood takes place. Being unable to remove these minute particles

of foreign matter, the body copes by walling off the particles. The walling off is done by a proliferation of fibrous cells that eventually produce a dense scar-like material in the functional area of the lungs. This process takes about six (6) months and is irreversible. Each repetition of inhalation and reaction adds a tiny deposit scar-like tissue in this critical area.

The accumulation of scar-like tissue decreases the functional volume of the lungs, stiffens the passage ways, and impedes the transfer of gases in and out of the blood. If the process continues, the functional capacity of the lungs becomes inadequate to support normal activities and may eventually be unable to support life.

Asbestosis progresses slowly as a disease. Damage begins with the initial insult, and scar-like tissue builds up over many years before symptoms become noticeable or a disgnosis can be made. In the majority of cases symptoms do not appear until more than twenty (20) years after initial exposure. The intensity and duration of each insult as well as the frequency of repetition combine with numerous individual characteristics to determine which persons who are exposed sustain noticeable lung damage, when functional impairment becomes noticeable, and what symptoms such a person finally demonstrates. Even if after a period of exposure, no additional asbestos fibers are inhaled, tissue change may nonetheless continue and be unnoticed for decades. Since the effects of tissue changes are cumulative, an exposed person's condition is the product of an unknowable sequence of insults arranged randomly or in groups along a continuum that stretches from as long as 50 years to less than six months prior to manifestation. Additional factors such as variations in ventilation, moisture in the air, and an exposed person's health at the time of any exposure combine to make it impossible to determine

which exposure to asbestos caused injury or to determine when such a person becomes "diseased." [3]

A second asbestos-caused disease, mesothelioma, is a malignant condition of cells lining the chest wall resulting in a tumor. This disease is rare except in persons who have been exposed to asbestos. The relationship between asbestos and mesothelioma is not well understood, and relatively small exposures over a period of a few years have been associated with this condition. The growth of a tumor generally follows a latent period of over 20 years during which there need not be any additional exposure. Diagnosis is possible within a short time of the beginning of tumor growth. Death follows diagnosis by less than two years in most cases. As with asbestosis it is virtually impossible to determine which exposure or exposures to asbestos cause the disease.

Bronchogenic carcinoma (lung cancer) is another malignant disease that has been associated with asbestos, at least in persons who smoke cigarettes. It also has a latent period following inhalation averaging approximately 15 to 20 years. It also progresses slowly, but can and often is diagnosed within a few years of its initial appearance.

II.

A. APPLICABLE LAW

[1-4] In a contract diversity action such as this, Michigan conflict of law rules require the application of the law of the place where the insurance policies were issued and countersigned. *Chrysler Corp. v. Insurance Co. of*

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[3] For a discussion of asbestosis and its effects on the body see Selikoff, Bader, Bader, Churg, and Hammond, "Asbestosis and Neoplasis," 42 Am.J.Med. 487 (1967); Selikoff, Churg, and Hammond, "The Occurrence of Asbestosis Among Insulation Workers," 132 Ann.New York Acad.Sc. 139 (1965).

North America, 328 F.Supp. 445 (E.D.Mich. 1971). The parties agree that Illinois law applies to the interpretation of all the policies except the Liberty Mutual policies, which are governed by New Jersey law. The law of both states holds that where the terms of an insurance contract are clear and unambiguous, they must be given their common and ordinary meaning. See *Canadian Radium & Uranium Corp. v. Indemnity Insurance Company of North America*, 411 Ill. 325, 104 N.E.2d 250 (1952); *Boswell v. Travelers Indemnity Co.*, 38 N.J.Super. 599, 120 A.2d 250 (1956); *Wilkinson & Son, Inc. v. Providence Washington Ins. Co.*, 124 N.J.Super. 466, 307 A.2d 639 (1973). In both states insurance contracts are to be liberally construed in favor of the insured and against the insurer. *J. L. Simmons Co. v. Fidelity and Casualty Co.*, 511 F.2d 87 (6th Cir. 1975) (applying Ill. law); *Last v. West American Co.*, 139 N.J. Super. 456, 354 A.2d 364 (N.J. 1976). If there are ambiguities in the policy, or uncertainty over its interpretation, the policy is to be construed against the insurer, and in favor of the insured. *Tiffany Decorating Co. v. General Accounts Fire and Life*, 12 Ill.App.3d 597, 299 N.E.2d 378 (1973); *Bryan Construction Co. v. Employer's Surplus Lines Ins. Co.*, 60 N.J. 375, 290 A.2d 138 (N.J. 1972). See also *Corbett Co. v. Ins. Co. of North America*, 43 Ill.App.3d 624, 2 Ill.Dec. 148, 357 N.E.2d 125 (1976).

B. POLICY LANGUAGE AND THEORIES OF INTERPRETATION

In each policy the insurer has agreed to pay on behalf of the insured such damages as are determined because of "bodily injury" caused by an "occurrence" during the policy period. "Bodily injury" *includes* injury, sickness and disease. "Occurrence" includes a continuous or repeated exposure to conditions which result in bodily injury. INA, Affiliated FM, Illinois National, and Liberty Mutual con-

tend that in lawsuits alleging asbestosis, mesothelioma, or lung cancer, coverage is provided by Forty-Eight's insurer at the time such a plaintiff's disease manifests itself, that is, the date on which the condition became known or should have become known to plaintiff or the date on which plaintiff's condition was medically diagnosed, whichever comes first. Relying heavily on statute of limitations and health insurance cases, these insurers argue that though there is tissue damage long before manifestation, a person cannot be considered injured or diseased until symptoms are noticeable or a diagnosis is made. They point out that an exposure may or may not result in lung damage; that only some persons who are exposed to asbestos dust inhale it; that only some of those who inhale it experience tissue change; and, that the level of tissue change only reaches the point of functional impairment in some of those who undergo such tissue change. Thus, they argue, exposure is not necessarily related to injury, and it is reasonable to say that injury or disease does not "occur" until functional impairment is noticeable.

They cite medical evidence to substantiate the contention that it is impossible to determine with any degree of certainty: (a) the correlation between the onset or progression of the disease with specific incidents of exposure; (b) the extent of damage at any particular date as the disease develops; or (c) the time at which bodily function begins to be impaired. They claim that the manifestation theory provides the only certain method of establishing coverage and advocate its adoption as a "rule of reason." *See, General Dynamics Corp. v. Benefits Review Board, et al.*, 565 F.2d 208 (2d Cir. 1977).

Forty-Eight and Travelers, on the other hand, contend that manifestation is unrelated to injury. They maintain

that these liability policies are "occurrence" or "accident" policies, not "discovery" or "claims made" policies. It is their position that I would drastically reform the terms of the relevant insurance contracts if I adopt the manifestation theory. They point out that the uncontroverted medical evidence indicates that tissue damage occurs shortly after inhalation and as far back as 50 years before manifestation. They cite medical evidence to show that asbestos-caused diseases involve cumulative minute injuries and are progressive. They characterize this chain of events as a "continuing tort" and claim that this makes all insurers on the risk from the time of alleged initial exposure through manifestation jointly and severally obligated to defend and to indemnify Forty-Eight if liability is found.

Following the decision in *Borel*, *supra*, holding all manufacturers of asbestos products to which a claimant was exposed jointly and severally liable, some insurers began to espouse the manifestation theory for coverage determination while others continued to advocate the exposure theory. Discussions and meetings have heightened the controversy and its continued existence is demonstrated by the fact that there are insurers on both sides of the issue in this declaratory judgment action. Forty-Eight has introduced numerous items of correspondence and other documents to show that even within certain insurance companies' practices and positions relative to this coverage controversy have changed over time.

In the three years prior to INA's letter of June 27, 1977, Forty-Eight tendered the defense of approximately 150 lawsuits to INA and the other carriers involved in this action. In every instance a defense was provided—usually by INA—without a reservation of rights raising the point that manifestation of the disease must occur during the coverage period as a requirement for coverage. There is

evidence that demonstrates that INA sought contribution and litigation expense arrangements with other insurers using periods of *exposure* as the determining factor. In some of the suits defended by INA without objection or reservation the manifestation date of a plaintiff's disease came after the expiration of INA's coverage. In all cases there is exposure alleged during INA's policy periods. Illinois National and Affiliated FM also each declined coverage in specific cases on grounds that the dates of *exposure* alleged in the complaint were outside the coverage period of their respective policies.

[5] I accordingly conclude that the conduct and correspondence of some of the insurers in this case are instructive on the issue of interpretation of the policies involved. *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 410, 24 L.Ed. 410 (1877); *Weger v. Robinson Nash Motor Co.*, 340 Ill. 81, 172 N.E. 7 (1930). The meaning the parties themselves attach to the terms of the contract can be inferred from their conduct. *Philips Electronics v. Leavens*, 421 F.2d 39 (3d Cir. 1970). From such conduct it would appear that the manifestation theory appears to be a new approach and that it was this that precipitated litigation quite soon after it was put into practice by the insurers who now advocate its adoption.

C. LEGAL IMPLICATIONS OF THE EVIDENCE

[6] Beyond this implicit approval of the exposure theory as the correct interpretation by three of the four carriers who now oppose it, there are several other factors that compel adoption of the exposure theory of coverage. The medical evidence establishes that each tiny deposit of scar-like tissue causes injury to a lung. Each such insult causing injury is an "occurrence" for the purpose of determining which coverage applies. (This must be distinguished from

any test that may be used to determine when an applicable statute of limitations begins to run in the underlying lawsuits.) This occurrence takes place within a short time after inhalation in any instance where exposure results in tissue change. It is irrelevant that not all persons who are exposed experience tissue damage; it is clear that, when a lawsuit is brought by a person who alleges an asbestos-caused lung disease, there is a strong likelihood that proof is available as to inhalation and tissue change. Each minute injury may then be a part of a "continuing tort," *Karjala v. Johns-Manville*, 523 F.2d 155 (8th Cir. 1975), and may constitute a separate occurrence. Consequently, each insurer on the risk when a currently diseased plaintiff was allegedly exposed is obligated to acknowledge coverage and to provide a defense and possibly indemnification.

[7] To obtain a judgment against Forty-Eight, a plaintiff in an underlying lawsuit must show exposure to Forty-Eight's asbestos products. A similar showing must be made in the underlying lawsuit as to other defendant asbestos manufacturers who, it is claimed, are involved. Having shown such exposure to the products of asbestos manufacturers and the existence of disease, such a plaintiff has made out a prima facie case of injury. Such a plaintiff's inability to fix the exact time when each injury occurred does not preclude liability in a case where such injuries are cumulative and progressive, and cannot be apportioned between given points or periods of time. *Borel*, *supra*, at 1094.[4]

By analogy, each insurer of each manufacturer has coverage for the injuries allegedly caused by that manu-

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[4] See also, Prosser, *Law of Torts*, (4 Ed. 1971), pp. 313-323, regarding apportionment of damages; Nachman, "The New Policy Provisions for General Liability Insurance," 18 The Annals, No. 3, p. 197 (Fall, 1965).

facturer. By being on the risk during an indivisible injurious process, each insurer is rendered jointly and severally liable to defend and indemnify its insured.[5]

Any other theory of coverage would render Forty Eight's insurance illusory. Under *Borel* and similar cases Forty-Eight may be held liable for asbestos-caused injuries occurring during the period from 1923 until 1970 when it discontinued the sale of asbestos products. If the manifestation theory is adopted, Forty-Eight would be effectively deprived of coverage it paid for and might be unable to secure coverage for liability in future cases where manifestation occurs after coverage is not available. Joint and several liability of the insurers who insured Forty-Eight at various times during the injury producing process (which I equate with exposure) is the

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Note also the reference to injurious exposure to conditions which results in injury. This eliminates any requirement that the injury result from a sudden event. Although it is most common that the injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident. For example, slow ingestion of foreign substances of inhalation of noxious fumes. In cases such as these, the definition of occurrence serves to identify the time of loss for the purpose of applying coverage—the injury must take place during the policy period.

In some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage which occurs during the policy period.

Elliott, New Comprehensive General Liability Policy, Liability Insurance Disputes Litigation Series, Practicing Law Institute, 12-3, 12-5 (1968). *Accord*, Long, Law of Liability Insurance, § 11.05A.

[5] For an analogous situation involving property damage that resulted from a process of dry rot following defective construction, *see Group Construction v. Insurance Company of North America*, 11 Wash.App. 632, 524 P.2d 427 (1974).

necessary analogue of Forty-Eight's potential joint and several liability to each plaintiff in the underlying lawsuits.

D. CONCLUSIONS OF LAW

[8, 9] Cases dealing with statute of limitation issues are not applicable to this coverage problem. *See, Tijsseling v. General Accident, Fire & Life Assurance Corp., Ltd.*, 55 Cal.App.3d 623, 127 Cal.Rptr. 681 (1976). Statute of limitation cases are based on public policy considerations which balance the prejudice to a defendant caused by stale claims when weighed against considerations of fairness to a plaintiff. So considered, it is at the time an asbestos-caused disease manifests itself in a way that implicates a causal relation to the manufactured product that the public interest in limiting the time for asserting a claim attaches, and it is then that the statute of limitations begins to run. *Karjala, supra; Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Because of this, courts often speak of the "injury" having "occurred" at that time as a way of determining when a cause of action accrues. Discovery is a necesary requirement for a fair rule in limitations of actions cases, but, from an insurance coverage perspective, it is the injury and not its discovery that subjects a manufacturer to liability and consequently its insurer to a duty to defend and to indemnify. The alleged injury in the underlying lawsuits is the formation of scar-like tissue because of the implanting of asbestos fibers in the lungs. If this injury causes a plaintiff to super damages, the insurer who was on the risk at the time that that injury occurred has the relevant coverage.

[10] INA has cited *General Dynamics, supra*, and its predecessor, *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137

(2d Cir. 1955), *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955) as explicit support for its position that the date of manifestation of disease should control coverage. Both these cases deal with workmen's compensation awards under the Longshoremen's and Harbor Worker's Compensation Act and apply the "last insurer" of the "liable employer" rule of coverage. They are clearly distinguishable in that Congress altered the common law to further a statutory compensation scheme. This and similar state workmen's compensation schemes that establish a "last employer" or "last exposure" rule for occupational disease cases are explicitly in derogation of the common law of contracts. Such common law principles are nonetheless still applicable in this case. The courts in *General Dynamics* and *Cardillo* concluded as they did because they held that the determination by Congress as to how the equities should be balanced in arriving at a comprehensive compensation scheme had to be followed. In this case I am bound to apply the contract laws of Illinois and New Jersey, and I am not permitted to determine public policy which may be in derogation of the common and statutory law of those states. If such is to be done, it must be done through legislative action.

There is no support in the insurance policies in this case for the contention that bodily injury must manifest itself during the policy period to invoke coverage. Such a requirement could have easily been drafted within the definition of "occurrence"—assuming that such a restriction would not be contrary to public policy. *Stauffer Chemical Co. v. Ins. Co. of North America*, 372 F.Supp. 1303 (S.D.N.Y.1973) concerned an "occurrence" policy. Stauffer manufactured a product that was intended to protect potato seedpieces against "seed rot" and "damp off." It was shown that the product was not effective in so doing. INA denied coverage

on the ground that the policy did not apply to liability which arose out of the ineffectiveness or failure of the product to perform as represented. INA said that there was no occurrence within the meaning of the policy because the conditions that caused injury were not Stauffer's product—it was rather the failure to prevent such conditions that caused injury. The court rejected this interpretation:

> However, it was not made a condition of coverage with respect to the definition of occurrence in the instant policy that the condition causing the injury be created by the insured, and the court may not inject a clause into the policy or make a new contract for the protection of the insurer. *Id.* at 1306.

Stauffer provides guidance in the matter of construction of insurance contracts, but it also meets INA's contention in this case that any given exposure cannot be an occurrence because it did not cause the worker to become diseased, that it merely made such a disease possible when the effects of additional exposures were added to it.

The proponents of the manifestation of disease theory cite case law holding that the time when the injury or damage occurs and not the time when the negligent act occurs determines insurance coverage. *See, e. g., Peerless Ins. Co. v. Clough*, 105 N.H. 76, 193 A.2d 444 (1964); *Remmer v. Glen Falls Indemnity Co.*, 140 Cal.App.2d 84, 295 P.2d 19 (1956); Annotation 57 ALR2d 1385. They argue that there is an implicit analogy between the negligence-injury sequence in those cases and the exposure-disease (severe enough to manifest itself) sequence alleged in the underlying lawsuits. This analogy is rejected. The negligent acts alleged in the underlying lawsuits occurred when the products were sold without sufficient warning, not when the plaintiffs were exposed. The medical evidence in this case

indicates clearly that injury to lung tissue occurs soon after exposure, not when the disease manifests itself.

[11] Two recent United States District Court cases deal with occurrence policies in this context. In *Porter v. American Optical*, Civil Action No. 75-2202 (E.D.La., entered November 23, 1977) (cited by INA) an asbestos worker who was diagnosed as having asbestosis, sued the manufacturer of a respirator alleging that his disease was caused by defects in the apparatus as well as defendant's failure to warn him of the danger involved in its use. Following a jury verdict and based on some of the evidence adduced at trial the court found that the insurer on the risk at the time of manifestation had to afford coverage even though another insurer also had an occurrence policy and had been on the risk throughout much of the period during which the plaintiff was exposed to asbestos. The court equated "bodily injury" with "sickness or disease sustained by any person," and found that the manifestation of the disease was the occurrence that triggered coverage. Such a construction is not warranted here. While the definition of bodily injury *includes* sickness or disease in the policies before me, the definition also specifically includes injury to the body within its terms. Because of the extensive medical testimony that tissue injury is sustained long before a worker can be termed diseased, the plain meaning of the term "bodily injury" requires coverage at the time of the insult of asbestos that follows upon exposure. *Porter* is also distinguishable in that it deals with coverage of the liability of a manufacturer of a respirator, not a manufacturer of asbestos products. The liability of a manufacturer of a product designed to prevent injury from an inhaled substance may be materially different from the liability of the manufacturer of the deleterious substance inhaled.

Appendix C

The second case is *Tenneco Chemicals v. Employers Mutual Liability Ins. Co.*, 76 Civ. 809 (S.D.N.Y., filed April 8, 1977) (cited by Forty-Eight). In the underlying lawsuit to that case, the plaintiff had been injected with a radioactive drug for testing purposes. The drug was defective in that it underwent atomic decay, breaking down into new elements and emitting harmful radiation during a 23-year period while lodged in plaintiff's body. Employers Mutual Liability Insurance Company was on the risk as an insurer for an eight-year period from two years after the injection until ten years after the injection. The policy provisions are the same as those before me in this case. The court there held that occurrence coverage is perhaps the broadest possible coverage and that injury caused by the drug was sustained during Employers' coverage period. This injury was held to be an occurrence for the purpose of determining coverage even though the condition of the plaintiff in the underlying lawsuit was not diagnosed until more than eleven years after the policy expired. *Tenneco Chemicals* is solid support for my holding.

III.

IMPLICATIONS OF THE ADOPTION OF EXPOSURE THEORY

The language of the various policies, the medical evidence as to bodily injury, and the reality of joint and several liability in the underlying lawsuits combine to mandate the adoption of the exposure theory of coverage. This conclusion, however, leaves several questions unanswered. How is the duty to indemnify to be apportioned? What is the liability of Forty-Eight in its self-insured status? How is "stacking" of policy limits to be avoided?

[12] In underlying cases in which Forty-Eight is held liable, it will in all likelihood be held jointly and severally

liable with other manufacturers for all damages caused by an indivisible injury.[6] This may ultimately result in an equal sharing of the payment of the judgment or in some negotiated formula for payment by each manufacturer found liable. Since each insurer covered Forty-Eight for differing periods of time, the obligation to indemnify should be apportioned on the basis of the relative lengths of their respective coverage periods.

As explained in footnote 5, *supra*, the indivisible and cumulative nature of the injuries and the possibility of a joint and several judgment may render Forty-Eight liable for all damages caused by an injury, some portion of which was caused by exposure to asbestos occurring *after* 1970 when Forty-Eight stopped manufacturing asbestos products. It is also possible that Forty-Eight may be held liable for all of the damages caused by an injury, some portion of which was caused by exposure to asbestos products of other manufacturers *before* a plaintiff was exposed to Forty-Eight's products. This application of the doctrine of joint and several liablity, in addition to providing a remedy when the cause or time of the injury cannot be determined precisely, is appropriate because the medical evidence shows that all insults to lung tissue from asbestos combine to cause functional impairment. Insults occurring before and/or after exposure to Forty-Eight's products would not cause the same injury if it were not for the insults that resulted from exposure to those products.

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[6] In the event that special questions to the jury or the post-trial certification of the judge establishes the dates of exposure to the products of each manufacturer, the judgment could be apportioned on the basis of the relative lengths of the periods of exposure.

It should be noted that this opinion deals only with insurance coverage and does not in any way address or establish what the liability of Forty-Eight may be in any underlying lawsuit.

Appendix C

[13] Since part of the injurious process for which Forty-Eight may be held liable in an underlying lawsuit may occur before 1955, or at some time in the future when it is uninsured, it must bear a part of such judgment in the same proportion as the periods during which it had no coverage bear to the total period of proved exposure. This does not render Forty-Eight's coverage illusory; the insurers have a duty to indemnify Forty-Eight for judgment liability for the injuries that are apportioned for the periods of their respective coverages, while Forty-Eight must bear judgment liability for injuries apportioned to the period when it had/has no coverage.[7]

[14] The table of coverage, *supra*, shows that different individual policies were in effect for varying lengths of time and had differing limits of liability. It might be argued that since an injury occurs each time an asbestos fiber insults the tissue of a lung, the policy limits for each policy period could be "stacked" to produce a coverage liability in any given case that would be many times the aggregate limit of any one policy. Forty-Eight has stated on the rec-

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[7] A hypothetical case may clarify this point. Assume, in addition to the facts as to coverage in this case, that Forty-Eight has liability coverage for asbestos-related injuries through 1979, but not thereafter. Assume further an award through a joint and several judgment to a plaintiff who was found to have been exposed to asbestos dust from January 1, 1945 to December 31, 1984. Also, assume that the proofs show that the plaintiff was exposed to the asbestos products of manufacturers X and Y from 1945 to 1950, to the products of Forty-Eight, and manufacturers X, Y, and Z from 1950 to 1970, and to the products of manufacturers Y, Z, and A from 1970 through 1985. Each insurer would be obligated to indemnify Forty-Eight for 1/40th of the judgment for each year that it was on the risk. Since Forty-Eight was self-insured or uninsured during portions of this period it would likewise be obligated to pay a portion of the judgment for each year of exposure during with it had no coverage—in this example 15/40ths.

ord that it does not seek to stack coverages in this way. In any event, no insurer should be held liable in any one case to indemnify Forty-Eight for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimant's exposure for which judgment was obtained.

Various aspects of these questions may arise. Insurers will be able to resolve many, if not all, of these questions since they possess great skills in the compromise and settlement of disputes.

IV.

THE DUTY TO DEFEND

[15] The duty to defend requires additional comment in that it is distinguishable from and in some ways broader than the duty to indemnify. *Sprayregen v. American Indemnity Co.*, 105 Ill.App.2d 318, 245 N.E.2d 556 (1969); *McFadyen v. North River Insurance Co.*, 62 Ill.App.2d 164, 209 N.E.2d 833 (1965). Each of the relevant policies contains a provision that the insurer will defend any suit against its insured that alleges injury, sickness, or disease and seeks damages on account thereof even if such suits are groundless, false or fraudulent. None of the policies contains language that makes manifestation a factor in determining whether or not there is a duty to defend.

In *Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976), the Illinois Supreme Court said:

> In determining whether the insurer owes a duty to the insured to defend an action brought against him, it is the general rule that the allegations of the complaint determine the duty. If the complaint alleges facts within the coverage of the policy or potentially within the coverage of the policy or potentially within the coverage of the policy the duty to defend has been established. (Citations omitted).

> This duty to defend extends to cases where the complaint alleges several causes of action or theories of recovery against an insured, one of which is within the coverage of a policy while the others may not be. (Citations omitted). 64 Ill.2d at 193-195, 355 N.E.2d at 28.

New Jersey law is to the same effect. *See, Burd v. Sussex Mutual Ins. Co.*, 56 N.J. 383, 267 A.2d 7 (1970).

The cumulative and indivisible nature of the injuries alleged in an underlying lawsuit may result in a judgment holding Forty-Eight jointly and severally liable for all of a plaintiff's damages. The cumulative and indivisible nature of the injuries also makes it impossible to determine when any given portion of such injuries occurred. Consequently, the resulting judgment relates to the entire period of exposure and must be apportioned by the length of each insurer's coverage. Query whether it necessarily follows that the duty to defend or bear the cost of defense should also be apportioned in this way. The public policies behind such an apportionment of the duty to indemnify do not exist with the same force as to the duty to defend. It might be contended that the insurer on the risk at the time the suit is brought, or the manufacturer if it is uninsured at the time the suit is brought, should assume all of the responsibilities and costs of defense. This might, however, result in unequal treatment of the various insurers. What is more, the defense of lawsuits that arise out of injuries caused during a policy period is one of the benefits Forty-Eight paid premiums for and is entitled to receive.

[16] The apportionment of the duty to indemnify should be accompanied by a similar apportionment of the costs of defense. These costs must also be apportioned over the entire period during which the alleged injuries occurred to

reflect the cumulative and indivisible nature of the process that gave rise to the cause of action. The duty to defend as established by this method will be coextensive with the duty to indemnify. In every case in which an insurer (or insurers) has coverage and there is a possibility that because of the allegations of a complaint it may be called upon to indemnify Forty-Eight, it also has a duty to defend or share in the costs of defense. These costs, if originally borne by one insurer, should be apportioned among all insurers under a duty to defend by the number of years of exposure for which each insurer provided coverage.

Since Forty-Eight is to be considered self-insured prior to 1955 and may well be uninsured in the future, it will also be obligated to bear such defense costs in direct proportion to the other insurers as stated above. It would be anomalous to hold that Forty-Eight is liable for a portion of a judgment because part of the alleged injury occurred when it had no coverage but allow it to avoid the costs of defending the suit for that period. As mentioned, *supra*, the policies involved are not "claims made" policies that provide coverage and defense only if a claim is brought within the policy period, but rather "occurrence" policies that provide coverage and defense for injuries that occur within the policy period. Since a portion of the injury is allocated to the period for which Forty-Eight is considered self-insured, it must be treated as an insurer, and a portion of the defense costs must be allocated to that period.[*]

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[*] The following hypothetical case illustrates this apportionment. Assume that Forty-Eight has coverage for asbestos-caused injuries through 1979, but not thereafter. Assume further that a lawsuit is brought in 1986 and that the plaintiff alleges exposure to asbestos dust from January 1, 1965 to December 1, 1984. Forty-Eight must assume the defense and ultimately pay 5/20ths of the cost of the defense.

[17-20] Since notice pleading was adopted, it has been held that an insurer has a duty to defend even if there is a doubt whether a complaint against an insured comes within the coverage of a policy. This duty to defend continues "until such time as the claim against the insured is confined to a recovery that the policy did not cover." *Carboline Co. v. Home Indemnity Co.*, 522 F.2d 363 (7th Cir. 1975) (applying Illinois law and citing numerous cases). Many of the underlying complaints allege general dates of exposure, and since exposure determines coverage, such an allegation is sufficient to trigger the duty to defend. *Burger v. Continental Nat. Am. Group*, 441 F.2d 1293 (6th Cir. 1971). If more than one insurer was on the risk during the alleged periods of exposure, they will be jointly and severally obligated to assume the defense. In those cases where no specific dates of exposure are alleged, the insurer providing coverage on the date the suit is filed must undertake the defense.[9] This duty, likewise, will fall upon Forty-Eight

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[9] If pretrial discovery uncovers specific dates of exposure which indicate that the current insurer cannot be held liable to indemnify Forty-Eight, that insurer may tender the defense to the insurer (or insurers) who could be held liable. An insurer faced with such a tender either from the current insurer or from its insured must assume the defense or make arrangements for sharing the cost of the defense. *See, Liberty Home Improvement v. Royal Globe Ins. Co.*, CCH Auto Cas. 17,682 (¶ 9394) (Tenn.App. 1977). Due regard must be given to possible conflicts of interest.

When the duty to defend arises as a question between insurers it is proper to go outside the complaint to make this determination. This is particularly so because of notice pleading. Long, Law of Liability Insurance § 502 (1976); *see also, Hartford Acc. & Indemnity Co. v. Allstate Ins. Co.*, 5 Ohio App.2d 287, 215 N.E.2d 416 (1966). Once it has been established by the investigation of the current insurer that the dates of exposure place the duty to defend on a prior insurer, the current insurer is entitled to be reimbursed for the costs of defense it has incurred.

for suits that are brought in a period in which it has no coverage. In these suits as well as in instances where, because of exposure prior to 1955 it could ultimately be liable for a substantial part of the judgment, Forty-Eight may want to assume control of the defense in any event. If it does, it will be entitled to be reimbursed for such part of the costs of that defense by any insurer who would be obligated to pay part of a judgment.

This opinion constitutes the required findings of fact and conclusions of law.

An appropriate order has been entered.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT 10, UNITED STATES CONSTITUTION

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

DIVERSITY CLAUSE, ARTICLE III, SECTION 2, UNITED STATES CONSTITUTON

The Judicial Power shall extend to all Cases, in Law and Equity . . .—between Citizens of different States. . . .

This court notes that a pragmatic approach would be to seek a determination of underlying liability before any attempt is made to fix the duty to defend.

Appendix E

THE RULES OF DECISION ACT, 62 Stat. 944, 28 U.S.C. SECTION 1652

The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

APPENDIX E

Asbestos Insurance Coverage Litigation

1. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981).
2. *Keene Corporation v. Insurance Co. of North America, et al. appeal docketed*, Consol. Nos. 81-1179, 1180, 1181, 1182, and 1248 (D.C. Cir.).
3. *AC & S, Inc. v. Aetna Casualty & Surety Co.*, No. 80-1341 (E.D. Pa., Oct. 6, 1980), *appeal docketed*, Nos. 80-2659/2660 (3d Cir., Nov. 3, 1980).
4. *AC & R Insulation Co., Inc. v. Fireman's Fund Insurance Co.* Civ. No. 350-81 (D.C. Super Ct., filed Jan. 12, 1981).
5. *Amatex Corporation v. Aetna Casualty & Surety Company*, Case No. 79-2305, Court of Common Pleas of Montgomery County, Pennsylvania.
6. *American Universal Insurance Company v. Amatex Corporation, et al.*, Case No. C-328207, Superior Court, Los Angeles County, Los Angeles, California.
7. *Asten Group v. Argonaut Insurance Company, et al.*, Case No. 5219, Common Pleas Court of Philadelphia.

8. *American Motorists Insuarnce Company v. Philip Carey Corporation, et al.*, Civil Case No. 79-0518, United States District Court, Southern District of New York; and the parallel action *The Celetox Corporation v. The Aetna Casualty & Surety Co., et al.*, Case No. 79-5885, Circuit Court of Hillsborough County, Florida.

9. *Centennial Insurance Company v. North American Asbestos, et al.*, Case No. 80-CH-42, Circuit Court of McLean Coutny, Illinois.

10. *Armstrong Cork Company v. Aetna Casualty & Surety Company*, Case No. C-315367, Superior Court, Los Angeles County, Los Angeles, California; and the parallel action *Liberty Mutual Ins. Co. v. Armstrong Cork Co.*, Civil Action No. 80-426-G, U.S. District Court, District of Massachusetts, (filed March 7, 1980)

11. *Crown Cork & Seal v. Aetna Casualty & Surety Company*, Case No. 1292, Common Pleas Court, Philadelphia, Pennsylvania.

12. *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Company*, No. 78-2739-Z, C.A., U. S. District Court, District of Massachusetts.

13. *Fireman's Fund Insurance Company v. Fibreboard Corporation, et al.*, Case No. 753-885, Superior Court, San Francisco County, San Francisco, California.

14. *GAF Corporation v. Insurance Company of North America, et al.*, Case No. C-286217, Superior Court, Los Angeles County, Los Angeles, California.

15. *Insurance Company of North America v. Nicolet Industries, Inc. et al.*, No. 971955, Cuyahoga County, Court of Common Pleas, Cleveland, Ohio.

16. *Johns-Manville Corporation, et al., v. The Home Insurance Co., et al.*, Case No. 765226, Superior Court, San Francisco County, San Francisco, California and the parallel *Commercial Union Insurance Company v. Johns-Manville Corporation, et al.*, Civil Action No. 80-306-N, United States District Court, District of Massachusetts.

17. *Standard Asbestos Manufacturing & Insulating Company v. Royal Indemnity Insurance Company, et al.*, Case No. CV80-14909, Circuit Court of Jackson County, Misosuri.

18. *Zurich Insurance Company v. Raybestos Manhattan, et al.*, Case No. 78-L-8760, Circuit Court of Cook County.

Respondent's Brief

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Nos. 81-198
81-199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LIBERTY MUTUAL INSURANCE COMPANY and
INSURANCE COMPANY OF NORTH AMERICA,
Petitioners,

vs.

FORTY-EIGHT INSULATIONS, INC., and
TRAVELERS INDEMNITY OF RHODE ISLAND,
Respondents.

BRIEF OF RESPONDENT FORTY-EIGHT INSULATIONS, INC. IN OPPOSITION

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STATEMENT REQUIRED BY RULE 28.1

This Brief is filed on behalf of Forty-Eight Insulations, Inc. which has no parent companies or subsidiary or affiliated companies (except wholly-owned subsidiaries), except as follows:

Parent Corporation: Foster Wheeler Corporation, a New York corporation

LIST OF PARTIES

Petitioner Insurance Company of North America was the sole Plaintiff in the District Court and an Appellant in the Sixth Circuit. The Defendants in the District Court were Forty-Eight Insulations, Inc.; Affiliated F M Insurance Company; Illinois National Insurance Company; Travelers Indemnity of Rhode Island; and Liberty Mutual Insurance Company. Affiliated, Illinois National, and Liberty were Appellants in the Sixth Circuit. Forty-Eight was an Appellee and Cross-Appellant.

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BRIEF OF RESPONDENT FORTY-EIGHT INSULATIONS, INC. IN OPPOSITION

THE WRIT SHOULD BE DENIED.

No Reason Exists for This Court to Review the Issues Raised by Petitioners Which Are Issues of State Law.

Petitioners' arguments concern nothing more than state law issues, and are wholly insufficient to warrant review by this Court. The Sixth Circuit's decision was entirely in accordance with the principles of *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938).

The burden-of-proof argument made by INA (Petition, pp. 16-27) and by Liberty (Petition, pp. 7-18) is now obviously considered by those Petitioners to be of great importance. Yet neither INA nor Liberty saw fit to mention the arguments they now make to this Court in their Petitions for Rehearing to the Sixth Circuit. Petitioners should have raised these questions below when they had the opportunity. Those Petitions were filed after the Opinion of the Sixth Circuit was entered on

October 21, 1981, and after the issuance of the Order modifying the Opinion on March 5, 1981. There, the same counsel for Liberty, who now argue that certiorari should be granted by this Court, quoted the paragraph in the Sixth Circuit's Opinion reading:

> "Accordingly, where an insurer can show that no exposure to asbestos manufactured by its insured took place during certain years, then that insurer cannot be liable for those years. The reason is simple: No bodily injury *resulting from Forty-Eight's products* took place during the years in question. The same thing would be true if an insurer could show that a worker used an effective respirator during certain years. Again, no 'bodily injury' would have taken place." [Liberty Petition for Rehearing, p. 14]

But counsel did not think it important to mention the next paragraph of the Sixth Circuit's Opinion which stated:

> "We think that this is implicit in the District Court's Opinion and only state it here for clarity. However, the burden of disclaiming coverage will be on the insurer for the year or years in question.[27]" [633 F. 2d at 1225; Appendix A, Liberty Petition, p. 28A]

Nor did counsel mention Footnote 27 containing the discussion of the burden of proof. It is obvious that the argument had no merit then and has no merit now.

It is on the issue of *disclaiming* coverage that the burden is placed upon the insurer. This result is supported by Illinois and New Jersey law. In certain circumstances, the burden of proof is upon the insured to prove that there is coverage under a policy in force at the time of the occurrence. Under the law of Illinois, however, there are several exceptions to this rule, all dealing with situations where an insurer attempts to disclaim coverage which would otherwise attach. Thus, in a declaratory judgment action where suit is instituted by the insurer, the insurer has the burden of proving that a given driver is not an insured under the policy. *Maryland Cas. Co.* v. *Iowa National*

Mutual Ins. Co., 5 Ill. App. 3d 384, 391, 283, N. E. 2d 27; *Rev'd on other grounds*, 54 Ill. 2d 333, 297 N. E. 2d 163 (1972). When the insurer assumes the burden of affirmatively demonstrating that a policy exclusion is applicable, the burden of proof is on the insurer. *State Farm Mut. Automobile Ins. Co.* v. *Schmitt*, 94 Ill. App. 3d 1064, 419 N. E. 2d 601 (1981) (When insurer attempts to limit liability by excluding coverage under certain circumstances, insurer has burden of showing loss claimed falls within ambit of exclusion); *Central National Life Ins. Co.* v. *Fidelity & Deposit Co.*, 626 F. 2d 537 (7th Cir. 1980) (under Illinois law in action on fidelity bond, insurer has burden of proving insured knew of the insured's employee's prior dishonest acts).

In duty-to-defend cases, if the complaint alleges facts within the coverage of the policy or potentially within the coverage of the policy, the duty to defend has been established. *Maryland Cas. Co.* v. *Peppers*, 64 Ill. 2d 187, 355 N. E. 2d 24 (1976); *Burd* v. *Sussex Mut. Ins. Co.*, 58 N. J. 383, 267 A. 2d 7 (1970). That duty to defend continues "until such time as the claim against the insured is confined to a recovery that the policy did not cover". *Carboline Co.* v. *Home Indemnity Co.*, 522 F. 2d 363 (7th Cir. 1975) (applying Illinois law). Confinement of the claim is the duty of the insurer. Concededly, the duty to defend is broader than the duty to indemnify. The point is that assuming an insurer is on the risk, the Sixth Circuit was following Illinois and New Jersey law to require that the insurer have the burden of disclaiming coverage from that time on.

Finally, no serious contention can be made that the main thrust of the Sixth Circuit's Opinion was other than upon the selection of the exposure theory—which would provide some coverage to Forty-Eight—as opposed to manifestation—which would provide no coverage to Forty-Eight. The burden of proof issue is but a footnote to the decision. This Court should not grant review based upon a single side issue which is a matter of state law and, in any event, was correctly decided.

Petitioners' contentions that the Sixth Circuit ignored state law on other issues are utterly without merit. It is conceded by

INA that the narrow issue of exposure versus manifestation was a question of state law which the Supreme Courts of Illinois and New Jersey had never expressly decided (INA Petition, pp. 10-11). The Sixth Circuit stated:

> "In this case we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes."
>
> "We *think* that Illinois and New Jersey courts would try to construe the contract language to embrace the exposure theory." [*Id.* at 1222; App. A, p. A25 (Emphasis added.)]

In support of its ruling, the Court reviewed and upheld the District Court's cogent discussion of state law pertaining to this issue (633 F. 2d at 1219-20; 451 F. Supp. at 1237-38).

In addition, the Sixth Circuit carefully reviewed and rejected Petitioners' arguments by analogy to Illinois and New Jersey cases as to the Statute of Limitations, Workmans' Compensation and health insurance. As to the Statute of Limitations cases, the court reasoned:

> "Here, we find that the policy considerations are the opposite of those present in the Statute of Limitations cases .... Statutes of Limitations are meant to protect defendants against stale claims, nor [*sic*] bar injured plaintiffs who have acted in good faith. Insurance contracts are meant to cover the insured [footnote omitted]." [633 F. 2d at 1220]

The Sixth Circuit likewise rejected Petitioners' analogy to the Workmans Compensation cases, concluding that the policy considerations underlying those decisions did not override the state law principles of contract law pertinent to this case. 633 F. 2d at 1221. The court discussed and rejected the Petitioners' analogy to the health insurance cases:

> "These cases certainly appear to provide support for the manifestation theory. We do not, however, view them as controlling here. On the contrary, we think that they

> support the exposure theory. The reason is that the health insurance cases rely on the same rules of construction that we think are applicable here: insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly, a policy must be construed to favor the legitimate expectations of the parties." [633 F. 2d at 1221]

In support of its discussion and conclusions concerning Petitioners' state law arguments, the Sixth Circuit discussed and considered a great number of state law cases concerning these as well as other state law principles. 633 F. 2d at 1220-22 & nn. 13, 14, 15, 16, 17 and 18.

No Illinois or New Jersey court had previously decided the precise insurance coverage problem presented by asbestos cases. In referring to the authorities from New Jersey and Illinois, and to the other cases, texts, and authorities, the Court clearly reached a decision the state courts of those two states would have reached had they been presented with the question. No magic words are required to satisfy the obligation of *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223 (1940). In short, Petitioners' quibbles with the Court of Appeals decision in interpreting state law do not raise issues worthy of review by this Court. *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944).

The conclusion is inescapable. The Sixth Circuit's reasoning and conclusions showed a scholarly attempt to ascertain what the courts of Illinois and New Jersey would have done in this situation.

The "parade of horrors" argument by Petitioners is also an insufficient basis for granting the writ. Petitioners are concerned with the practical consequences to themselves of their own failure to forecast the extent of the risk they were assuming when they chose to use their standard language policies, which were inadequate to deal with asbestosis cases (633 F. 2d at 1226 n. 29).

Concern that the insured is put in an impossible situation (Liberty Petition, p. 8) by sub-clinical injury is also misplaced.

Forty-Eight Insulations wants the injury theory adopted because it is a correct interpretation of policy language. Without it, Forty-Eight would have no coverage at all and injured persons who proved their cases as to Forty-Eight would have no effective recourse under law.

In an extremely complex situation, Liberty makes a simplistic argument that the solution should be:

> "... administratively manageable ... one that can be applied with a minimal need for litigation" ... (Liberty Petition, p. 20).

The argument also ignores the record, applicable state law and common sense. As Judge Feikens noted in his District Court opinion after discussing the implications of the adoption of exposure theory:

> "Various aspects of these questions may arise. Insurers will be able to resolve many, if not all, of these questions since they possess great skills in the compromise and settlement of disputes." [451 F. Supp. at 1243]

Liberty's arguments concerning conflicts of interest and difficulties in settlement of cases (Liberty Petition, pp. 21-22), are echoed by INA's contention that manifestation makes administration of individual lawsuits simple and straightforward, whereas under the exposure theory, administration is complex and cumbersome (INA Petition, p. 5). There is not one word of evidence in the record that this is so. Neither theory will make the underlying cases go away. It is well established that mere difficulty of performance is no excuse for failure to perform under a contract. *Consolidated Laboratories, Inc.* v. *Shandon Scientific Co.*, 413 F. 2d 208, 212 (7th Cir. 1969). Nor can an insurance company escape its state law duty of undivided loyalty to policyholders by claiming conflicts of interest.

Any administrative difficulties are the creation of the insurance industry itself. Its ample resources and able lawyers can surely find a way to expedite handling of these asbestos claims in a forthright and expeditious manner.

CONCLUSION

Based upon the foregoing reasons, Respondent Forty-Eight Insulations, Inc. respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Petitioner's Reply Brief

Petitioner's Reply Brief

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No. 81-199

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OCTOBER TERM, 1981

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vs.

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TRAVELERS INDEMNITY OF RHODE ISLAND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER LIBERTY MUTUAL INSURANCE COMPANY

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REPLY BRIEF OF PETITIONER LIBERTY MUTUAL INSURANCE COMPANY

One seldom sees so many non-parties devote so much effort to explaining why a case does not raise issues substantial enough to warrant attention by this Court. Herewith, a brief reply to the principal arguments raised in the recent flurry of briefs and *amicus* briefs in opposition.

1. All of the opposition briefs point out that the insurance coverage issue here is a novel one. They argue from this point that the court below was entitled to make an educated prediction as to how the state courts would treat this issue, since there was no controlling state law on it.

This argument misapprehends both Liberty's position and the significance of the Sixth Circuit's holding. There is no question but that the asbestos insurance coverage question has not been decided by the state courts of New Jersey, Illinois, or anywhere else. It is equally clear, however, that the general rule that the insured has the burden of proving facts necessary to establish coverage in a dispute with its insurer *has* been decided

and adhered to again and again, in both Illinois and New Jersey, as the many cases discussed at pages 13-16 of our petition disclose. With respect to the burden of proof issue, therefore, the Sixth Circuit did not simply use its best judgment to divine what rule a state court would adopt if it was presented with the issue. Instead, as the Sixth Circuit itself admitted, it "reversed" a well established state rule purely for policy considerations—*viz.*, the wish to "maximize" coverage. 633 F.2d at 1225, n. 27. Contrary to what the Armstrong *amici* say at page 3 of their brief, it is not in the least "routine" for a federal diversity court to "reverse" an acknowledged state rule of decision in this fashion.[1] To the contrary, it is unheard of.

2. Two of the *amici*, Keene and Armstrong, argue, albeit half-heartedly, that the court below correctly decided the burden of proof question in the first place. Keene's argument rests upon the proposition that an insurer's duty to defend its insured is broadly construed, so that a duty to defend exists unless the complaint against the insured cannot possibly be construed so as to involve coverage. This is not an evidentiary rule, however, but a principle of insurance law. It has nothing to do with which party bears the burden of proving the facts necessary to establish coverage in a dispute between insurer and insured. In our petition we cite eight New Jersey cases decided between 1935 and 1968 which specifically hold that this burden is upon the insured. Keene cites not a single case to the contrary. Indeed, it cannot do so. As even the court below straightforwardly admitted, ". . . the general rule is that the burden of proof to show coverage is on the insured," citing some of

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[1] *Cf.*, the criticism of the *Forty-Eight* court's refusal to follow precedent voiced by the district court in the *Eagle-Picher* case appended to the Supplemental Brief of Liberty and INA, to the effect that it "appears to rest primarily on considerations of policy and result." *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., et al.*, Civ. Action No. 78-2739-Z (D. Mass., Aug. 14, 1981) appeal docketed, Nos. 81-1761/62/63 (1st Cir. Sept. 25, 1981).

the same cases cited in our petition. 633 F.2d at 1225, n.27.

Armstrong quarrels with what the Sixth Circuit says as to the burden of proof, claiming "a number of jurisdictions, including New Jersey, place this burden on the insurer." Armstrong's effort to prove this dubious proposition, however, is even more desultory than Keene's. Armstrong mentions just one New Jersey case, *James v. Federal Ins. Co.*, 5 N.J. 21, 73 A.2d 720 (1950), and it relegates that to a footnote. Unlike the instant case, however, that case involved an exclusion in the policy. This case has nothing to do with policy exclusions, the proof of which generally does lie with the insurer. Moreover, in *James* the court ordered a directed verdict in favor of the defendant-insurer at the close of plaintiff's case, on the basis that the testimony of plaintiff's own witnesses showed that the plaintiff had no coverage because of the exclusion. Nothing in the case, therefore, by any stretch of the imagination contradicts the long line of holdings, by the New Jersey courts and others, referred to in our petition, that it is the insured which generally must prove coverage.

3. The argument is made by Travelers and the Armstrong *amici* that Liberty is improperly attempting to have this Court prescribe a "national solution" for the asbestos coverage issue, in derogation of the authority of the state courts. Again, they misapprehend our argument.

There is no question but that the legal principles which govern the interpretation of contracts are constitutionally within the province of the highest courts of the various states, not the federal courts. That has nothing to do with the issue at hand, however. The issue here is whether the federal courts, in interpreting issues of contract which are before them pursuant to their diversity jurisdiction, are at liberty to alter established rules of state law on the basis of policy considerations.

It may be true that this Court should not instruct the courts of the various states how they should inter-

pret contracts, but we do not ask the Court to do that. What we ask this Court to do, however, is to assure that the lower federal courts respect their obligations under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to follow state rules that are firmly established and clearly applicable. The arguments of the opposition briefs would be more on point if this Court were asked to review a state court judgment "reversing" the ordinary burden of proof because of the unusual nature of this coverage litigation. That a federal diversity court has done so, on the other hand, presents an altogether different constitutional problem.

4. Some of the briefs in opposition criticize Liberty's petition on the basis that the Sixth Circuit's ruling on the burden of proof was merely "a corollary [collateral?] issue in a single footnote." See, *e.g.*, brief of Armstrong *amici* at 6. In a more substantive vein, the opposition briefs also complain that the burden of proof issue is not that important in the insurance coverage controversy anyway. Travelers, for example, alleges at page 10 of its brief that in its experience establishing what products were used at what time presents "no insurmountable problems."

These arguments will not wash. Even the Armstrong *amici*, admit at page 6 that the burden of proof ruling is the lynchpin of the Sixth Circuit's coverage holding. As they put it, without the reversal of the common law burden of proof rule, the Sixth Circuit's holding "would have had the dual effect of rendering Forty-Eight's insurance coverage totally illusory and of making the court's substantive ruling on exposure-based liability an exercise in judicial futility." As to Traveler's point, the Sixth Circuit itself has provided the best rejoinder. In footnote 27 the court wrote that "in many if not most cases, it will be impossible to tell which company's products were used at what time."

5. Forty-Eight and Travelers both argue that because the burden of proof/*Erie* issue has not been briefed be-

fore, it should not be determined here. Travelers goes so far as to berate Liberty for not having raised the burden of proof question in the district court. We did not, of course; the question was raised *sua sponte* by the Sixth Circuit in its footnote 27. The district court, although it adopted an exposure rationale, did not purport to reverse the usual rule as to the burden of proof.

A point that at first blush might not seem so strained is Forty-Eight's charge that because Liberty did not raise the burden of proof question in its rehearing petitions before the Sixth Circuit, it should be precluded from doing so here. From this fact Forty-Eight concludes that it is "obvious" that the *Erie* argument raised in the petition has no substance. There are two flaws in this argument. First, it is not necessary even to file a petition for rehearing in order to seek a writ of certiorari, so Liberty cannot be precluded from raising a constitutional issue inherent in the lower court's ruling by its selection of other points to raise in the rehearing petition. Second, and a related point, the severe page limitation applicable to a rehearing petition forced difficult tactical choices as to which issues to include and which to omit. At the time it seemed advisable to attack the Sixth Circuit's ruling on a wider front, and Liberty did so in its rehearing petition. Making that difficult choice certainly should not preclude us from pointing out other, constitutional, infirmities in the Sixth Circuit's approach.[2]

Travelers also argues that because of the way in which the burden of proof holding emerged, there is an insufficient factual record for this Court to consider it. The issue is entirely one of law, however. We do not read *Erie* as requiring the federal courts to apply state law unless the facts persuade them that the state rule is

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[2] There is a substantial body of general insurance law which even the Sixth Circuit admitted affords "solid arguments to support the manifestation theory." 633 F.2d at 1219. Much of Liberty's rehearing petition asked the Sixth Circuit *en banc* to reconsider the panel's decision to disregard these precedents.

inappropriate under the circumstances. Thus the case is like *Milhouse v. Levi*, 548 F.2d 357, 363 (D.C. Cir. 1976), where the court addressed the merits of a constitutional argument raised for the first time on appeal.

6. Several of the opposition briefs contend that Liberty overstates the practical problems which the Sixth Circuit's holding will create. At page 18 of its brief, for example, Travelers proposes that the problems which we have referred to can best be served "through the creative and voluntary efforts of manufacturers and insurers." [3]

This is precisely the adjuration made three-and-a-half years ago by the district court. That court recognized that many practical problems would arise in implementing its exposure holding, but commented that "insurers will be able to resolve many, if not all, of these questions since they possess great skills in the compromise and settlement of disputes." 451 F.Supp. at 1243. The district court's optimism might be excused on the basis that the *Forty-Eight* case was the first of the asbestos insurance coverage cases. Enough history has unfolded since the district court's words, however, to make a mockery of Travelers' wishful thinking. There are now more than 20 declaratory judgment cases throughout the United States, involving asbestos products coverage alone. In addition, there are now second generation cases involving numerous pharmaceuticals and the defoliant known as Agent Orange. The kindest thing that can be said about Travelers's call for "creative and voluntary efforts" is that it has not been heeded yet. To the contrary, there are so many different interests involved, and the stakes are so enormous, that the asbestos insurance coverage controversy evidently can be resolved only through judicial intervention.

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[3] Travelers also says that the court should eschew "the kind of judicial legislation for which the petitioners call." This is an odd charge for Travelers to make. It is Liberty which is arguing in support of the well-established precedent and Travelers and the other opposition parties who are advocating a departure on the basis of the "unique" situation here presented.

For proof that the Sixth Circuit's approach to coverage will give rise to more questions and litigation than it settles, one need look no further than the *Keene* litigation in the District of Columbia.[4] In *Keene*, the district court followed the Sixth Circuit's ruling here down the line. No sooner had the case reached the court of appeals than all of the problems referred to in Liberty's petition arose with a vengeance. Specifically, as the Court's filings of Keene Corporation disclose, one insurer, Hartford (an *amicus* in opposition to certiorari here and a party in No. 81-200), refused to participate in the settlement of cases being handled by Liberty, on the basis that it wanted more information about when exposures took place, how those exposures were substantiated, and the like. This imbroglio led to Keene's filing a motion for preliminary injunction in the district court, on August 10, 1981, on the basis that two million dollars in settlements were in jeopardy because the parties could not agree upon their various obligations and rights under the exposure result. The court did not reach that motion for lack of jurisdiction, inasmuch as the case was in the court of appeals.

The District of Columbia Circuit opinion in *Keene* rejected all three of the other federal decisions in this case—*Forty-Eight*, *Porter*, and *Eagle-Picher*. Whether it will give rise to the same logistical nightmares as the *Forty-Eight* court's variation of the exposure theory remains to be seen. One thing which is clear, however, is

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[4] *Keene Corporation v. Insurance Company of North America, et al.*, No. 81-1179 and consolidated cases (District of Columbia Cir., Oct. 1, 1981), *rehearing denied*, Nov. 19, 1981. In *Keene* the D.C. Circuit has taken a completely different approach from that of any of the other coverage decisions. Like the instant case, however, it, too, has reversed the burden of proof—also in a footnote! The court said at page 34, n.42, that the asbestos coverage cases are "unique" and not amendable to "traditional procedural rules." Accordingly, "reversal of the ordinary burden of proof will be more equitable for all parties and will prevent unnecessary litigation." We discuss the *Keene* case further in item 7 below.

that the practical problems which we referred to in our petition are not in the least fanciful.

7. A major prong of the attack of the Armstrong *amici* and *Keene* is that the record in this case is inadequate. To support this assertion, these *amici* refer at length to documents adduced in other litigation, principally the *Keene* action. Four points should be made in response.

First, the documents and testimony quoted at length in these opposition briefs, obviously, are from a case not before the Court. The proper function of an *amicus curiae* is to address its arguments to points raised on the record in the case in which it seeks leave to appear. Keene's practice of relying upon bits and pieces from other records in actions where it is not a party is a well-established habit by now. In the Sixth Circuit in *Forty-Eight*, and in the Fifth Circuit in *Porter*, Keene likewise sought to "improve" upon the record by adding materials which it contended would assist those courts in their review of the coverage issue. Both courts rejected Keene's improper use of materials from other cases. The Sixth Circuit's order doing so was dated May 3, 1979, and the Fifth Circuit's, December 19, 1979. Because the *Keene* case will be before this Court soon enough to allow all of the parties a fair opportunity to rely upon the record made therein, Liberty has not moved to strike Keene's *amicus* brief. The distaste which both the Fifth and Sixth Circuits expressed toward such efforts to base one's arguments on selective quotations from a record not before the Court, however, is equally warranted here.

Second, while the matter is inappropriate for consideration as outside the record, if it were appropriate then fairness would demand that it be considered in its entirety. It should surprise no one that the documents selected by these *amici* for their quotations are but a handful of those which have been produced in the other coverage lawsuits. The *amici* argue, for example, that the draftsmen of the standard form insurance policies in the 1960s

specifically rejected the manifestation interpretation advanced by Liberty and others, ignoring the fact that although the draftsmen did not use a policy draft which contained the word "manifest;" they did much the same thing by ending up with one providing for coverage when injury or disease resulted during the policy period. Indeed, the *amici* also ignore other documents which make it clear that the draftsmen specifically considered, and rejected, exposure to the insured's injury-producing product as the trigger of insurance coverage. Although this is not the place to hold forth at length on our view of what documents of this sort establish, it is appropriate to point out that reliance upon the handful of documents referred to out of context by the *amici* is not a procedure likely to be illuminating.

Third, although Keene argues that the additional material which this Court should consider is of critical importance in understanding the issues presented, it is noteworthy that the District of Columbia Circuit did not rely on a shred of this evidence in its recent opinion—even though Keene presented it with a voluminous nine-volume appendix. Similarly, although the district court heard medical evidence about the nature of the lung diseases associated with asbestos, it also refused to consider evidence of the sort that fills Keene's brief, presumably on the basis that the insurance policy language is straightforward.

Fourth, the District of Columbia Circuit on November 19, 1981, denied rehearing petitions in the *Keene* case. Accordingly, that action, too, is ripe for presentation to this court. INA has stated in its response to Forty-Eight's motion for leave to file a cross-petition that it intends to file a petition for a writ of certiorari in *Keene* by November 30, 1981. Liberty likewise intends to file such a petition as quickly as possible. To the extent that there are "inadequacies" which any of the opposition parties wish to assert with respect to the record in the *Forty-Eight* case, therefore, the imminent arrival of the

Keene record will obviate that shortcoming. Liberty agrees with the suggestion of some of the other parties that resolution of the instant case should be deferred until the *Keene* case is also present for review.

CONCLUSION

This case involves issues which are presently before more than 20 courts throughout the country, and as to which the lower federal courts are in complete disagreement. What the Sixth Circuit has done in reversing the ordinary state-created burden of proof is central to its decision. As the Armstrong *amici* themselves admit, without this reversal an exposure-based holding becomes a "judicial futility," which no court will be able to credit. Whether the other federal courts which face this insurance coverage issue may constitutionally reverse the burden of proof as was done here is thus inevitably destined to be an issue of great importance to those courts. Liberty contends that ample authority proves that the Sixth Circuit was not entitled to discard state law in the manner it found necessary to support its coverage holding. Given the number of parties vitally interested in the resolution of the asbestos insurance question, and the number of federal courts in which that and related coverage questions are raging, the importance of a definitive answer to this contention could not be more self-evident.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN OPPOSITION AMICUS CURIAE.

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

American Home Assurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Granite State Insurance Company; AIU Insurance Company; The Insurance Company of the State of Pennsylvania; New Hampshire Insurance Company and Lexington Insurance Company hereby request leave to file the attached Brief in Opposition to the Petition for Certiorari based upon the following:

1. Amici are insurance companies who have, at varying times, issued excess general liability policies to various manufacturers of products containing asbestos.

2. Amici have been sued by their insureds and other insurers in the following cases presently pending in the State Courts of California:

(a) *G.A.F. Corporation v. Insurance Company of North America, et al.* (No. C 286217) (Los Angeles County)

(b) *Armstrong Cork Company v. Aetna Casualty and Surety Company* (No. C 315357) (Los Angeles County)

(c) *Fireman's Fund Insurance Company v. Fibreboard Corporation, et al.* (No. 753885) (San Francisco County)

(d) *Johns-Manville Corporation, et al. v. The Home Insurance Company, et al.* (No. 765226) (San Francisco County).

3. In each of these cases the insured has *inter alia* sought a judicial declaration regarding the proper construction of certain terms of the respective policies. Specifically, the cases to a large extent turn on whether or not the California Courts find that the "exposure" or the "manifestation" theory of coverage applies in construing the term "occurrence" in these policies.

4. All four of these cases have recently been coordinated for all purposes before a single state judge pursuant to the California Rules of Court (designated as "Coordination Proceeding No. 1072"). The cases are presently in varying stages of pre-trial discovery.

5. In each case, *amici* have urged that the exposure theory of coverage is the correct construction of their respective policies under applicable state law.

6. The consent of the attorney for Petitioner has been requested but refused.

7. Amici believe that plenary review by this Court of any of the questions presented is unwarranted, and if granted, may have a significant impact on the course of the litigation in California in which they are parties.

Respectfully submitted,

LYNBERG & NELSEN,
NORMAN J. WATKINS,
CHARLES A. LYNBERG,
JEFFREY CARLISLE,
By NORMAN J. WATKINS,
Counsel for Amici.

No. 81-199

IN THE

Supreme Court of the United States

October Term, 1981

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

FORTY-EIGHT INSULATIONS, INC., and TRAVELERS INDEMNITY OF RHODE ISLAND,

Respondents.

AMICUS CURIAE BRIEF IN OPPOSITION.

Amici Curiae American Home Assurance Company; National Union Fire Insurance Company of Pittsburgh, Pa.; Granite State Insurance Company; AIU Insurance Company; The Insurance Company of the State of Pennsylvania; New Hampshire Insurance Company; and Lexington Insurance Company, respectfully urge that this Court refuse plenary review in this case and in part deny the Petition for Writ of Certiorari, seeking review of the Sixth Circuit's opinion in this case.

REASONS WHY THE WRIT SHOULD BE DENIED AND PLENARY REVIEW NOT GRANTED.

1. This Case Does Not Involve Federal Questions and Is Not, as a Practical Matter, Worthy of Plenary Review by This Court.

The Petition seeks plenary review of essentially two holdings[1] of the Court of Appeals: First, whether under New Jersey law the contract should be construed as providing coverage on an "exposure" basis, and second, whether the Court properly decided and allocated the burden of proof between insurer and insured regarding the existence of coverage in these cases. For the reasons that follow, we believe that the Petition should be denied with respect to the former and granted and simultaneously remanded with instructions regarding the latter.

At the outset it must be emphasized that this case only involves the interpretation of various insurance contracts and does not involve any federal issues.[2] This alone is a compelling reason for denying *certiorari*. Moreover, the rule of this Court has long been established in diversity cases that where the District Court and Court of Appeals agree on the meaning and manner of applying state law, independent review in this Court is, for all practical purposes, foreclosed. *Bishop v. Wood*, 426 U.S. 345, 347 (1976).[3] And this is so regardless of whether or not the state courts have addressed the question. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630 (1945).

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[1]Although three questions are actually presented for review, the third is not addressed here.

[2]Although Petitioner claims a constitutional question in their first question, that question merely reaffirms the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[3]In *Bishop*, the Court of Appeals actually affirmed the District Court by an equally divided vote of the Court. *Id.* at 346.

Although the District Court was affirmed by the court below,[4] Petitioner nevertheless urges that this Court find exceptional circumstances here and grant full review of the decision below. They argue that this case is worthy of review because of its overall impact on the nation's judicial system and the insurance industry (Pet. 12).

Although it is true that a large volume of lawsuits claiming asbestos-related injuries have been filed in the United States, this fact obviously will not be altered by granting the Petition or, for that matter, by reversing the Sixth Circuit's opinion. Nor will a decision on the merits resolve, on a national basis, the exposure versus manifestation dispute. At best, a decision on the merits will affect New Jersey cases and perhaps settle New Jersey law on the coverage question.

Petitioner speculates that the underlying litigations will be complicated if the Petition is not granted. Even if true, the effect of a decision on the merits by this Court would, of course only have a direct effect on cases pending in the New Jersey Courts or cases to be tried under New Jersey law. This is precisely why diversity cases involving questions of state law alone rarely warrant review by this Court and this case is no exception. Also, there is simply no reason to assume that insureds and insurers will not join together in defense of these claims. Indeed, this has occurred to a great extent in California.

It is true that many persons have been harmed as a result of exposure to products containing asbestos. And it is also true that the administration and, if necessary, the adjudication of these claims may place substantial strains on the insurance industry and the courts. These administrative bur-

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[4]Section 3 *infra* points out that the Court of Appeals did depart from the District Court's ruling in one respect by addressing and deciding the burden of proof question.

dens are unfortunately inescapable and they will not be appreciably diminished by the granting of the Petition.

Nevertheless, Petitioners suggest that the Court of Appeals', and, for that matter the District Court's, opinion adopting the exposure theory will exacerbate these problems (Pet. 20). Assuming this as a fact however lends no support to the Petition because inconvenience to the courts simply is not a proper judicial consideration in construing private contracts.

2. The Court of Appeals Decision That New Jersey Law Would Require the Coverage to Be Apportioned on an "Exposure" Basis Is Correct.

The Court below was presented with the issue of when "bodily injury" occurs (as those terms are defined in the general liability policies) in a claimant who has contracted an asbestos-related disease. There are no authoritative New Jersey decisions resolving this issue, and therefore, the District Court and Court of Appeals properly attempted to anticipate what a New Jersey Court would decide in a like case. The Court below did not reach this decision in a vacuum. Upon deciding that certain contractual terms require interpretation as applied to the context of progressive asbestos-related disease, it carefully evaluated policy considerations which were well-established in state law, as well as relevant factual findings to conclude that the exposure theory applied.

In the absence of established state law, federal courts can and must make educated estimates of what the state courts would decide under like circumstances. The decision below thoroughly considered the authorities presented, as well as the obvious policy considerations which of course would have presumably been considered by a New Jersey Court. For example, the Sixth Circuit noted and was guided by the

New Jersey precedents that contracts are to be liberally construed in favor of the insured and against the insurer, and if there are ambiguities in the policy or uncertainty over its interpretation, the policy is to be construed against the insurer and in favor of the insured.

In discharging its responsibilities under *Erie*[5] and its progeny, the Court below considered related decisions of New Jersey Courts. It correctly concluded that the "analogous" decisions discussed in the Petition did not resolve the manifestation versus exposure controversy in the context of applying general liability policies to asbestos-related claims. The Sixth Circuit reviewed, analyzed and rejected these decisions because the medical evidence, the expectations of the parties and the fundamental state policies applied in the asbestos-related injury context compelled a finding that the exposure theory would be adopted by the New Jersey Courts.

The Sixth Circuit properly determined that the manifestation rule which applies in the worker's compensation cases would not be applied by New Jersey Courts to liability insurance cases. The administrative considerations which are the fundamental basis for the "last employer pays" rule in worker's compensation cases do not outweigh the rules of contract interpretation applicable to liability insurance coverage cases. Likewise, health and accident insurance cases in New Jersey also adopt the common rule that there is no coverage until a disease is diagnosable. The reason for this rule is that it promotes coverage for the insured and favors the legitimate expectations of the parties. Transferring this "diagnosable" rule to the liability insurance area would however result in precisely the opposite result. The manufacturer, under a manifestation rule, would be faced

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[5]*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

with the impossible task of obtaining insurance for periods of time when the asbestos-related diseases are becoming manifest themselves. Recognizing this, and bearing in mind New Jersey general policy favoring coverage, the Court below in our view correctly predicted how New Jersey Courts would react to this dilemma

Precisely the same reasoning bottoms the Sixth Circuit's rejection of the Statute of Limitation cases which were also advanced by Petitioner. Transposing the New Jersey rule limiting actions only after the disease or injury was manifested to the asbestos area would entirely undercut the reason for the rule in the first place — to promote coverage.

The Sixth Circuit thoroughly analyzed all the relevant state law and carefully evaluated the purposes of various analogous decisions. In the absence of any state court precedent, the Sixth Circuit properly fulfilled its responsibility to determine what the state courts would do with a similar case and arrived at a reasonable prediction of New Jersey law. That decision should therefore be left undisturbed. *Spiegel's Estate v. Commissioner of Internal Revenue*, 335 U.S. 701 (1949).

3. The Court of Appeals Erroneously Decided and Allocated the Burden of Proving Coverage in This Case.

The Court of Appeals did depart from the District Court on the question of burden of proving coverage between the insured and the insurer. Recognizing that "the general rule is that the burden of proof to show coverage is on the insured" (INA Pet. App. A, 633 F.2d 1212, 1225), the Court of Appeals "simply reverse[d] the ordinary burden of proof and place[d] it on the insurer." (INA Pet. App. A, 633 F.2d 1212, 1226 n .27).

Although we disagree with the Sixth Circuit's ruling in this respect[6] we do not urge that the Petition be granted to review this aspect of the decision. Rather, we urge this Court to vacate this portion of the opinion and remand the case with instructions to "ascertain from all the available data what the state law is and apply it". *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940).

A remand is in order because it is unclear whether the Court below simply ignored the state law or concluded that its holding actually reflected the law of the state on this issue. This question is accentuated by the fact that the Sixth Circuit apparently did not have the benefit of briefs or argument from counsel regarding the allocation of the burden of proof under New Jersey law. (Petition at 10 n. 11.) Under these circumstances, it is entirely appropriate for this Court to simultaneously grant the Petition, vacate this portion of the opinion, and remand for full consideration of the state law in this area. Indeed, it may be necessary that the case be remanded to the District Court on this question in that it was raised *sua sponte* by the Court of Appeals. See: *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

CONCLUSION.

Based upon the foregoing arguments and authorities, *amici* respectfully request that this Court 1) deny the Petition as to questions two and three and, 2) grant the Petition with respect to the first question presented and thereafter remand

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[6]Amici agree with Petitioner that the Court below erred in this ruling and should review be granted, we would support reversal of that decision based upon the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the vast Illinois authorities pointed out by Petitioner.

the case to the Court below with instructions as deemed proper to insure thorough consideration of the state law bearing on this issue.

Respectfully submitted,

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